

REPORTS

OF,

CASES

DETERMINED

IN THE

Court of 'Sudder Dewanny Adawlut,

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

A NEW EDITION.

BY W. H. MACNAGHTEN, ESQ.

REGISTER OF THAT COURT.

VOLUME II.

CONTAINING

SELECT CASES FROM 1812, to 1819, INCLUSIVE.

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1827.



J U D G E S
OF THE
COURT OF SUDDER DEWANNY ADAWLUT

PRESENT
DURING THE PERIOD OF THESE REPORTS.

IN 1812.

J. H. HARINGTON, Chief Judge, absent from 22d August.
JOHN FOMBELLE.
JAMES STUART.
WILLIAM EDWARD REES, Officiating.
YNYR BURGES, Officiating, absent from 5th December.
HENRY THOMAS COLEBROOKE, Officiating Judge, from 22d December.

IN 1813.

J. H. HARINGTON, on leave.
JOHN FOMBELLE.
JAMES STUART.
WILLIAM EDWARD REES, Officiating.
HENRY THOMAS COLEBROOKE, Officiating.

IN 1814.

J. H. HARINGTON, on leave.
JOHN FOMBELLE.
JAMES STUART.
WILLIAM EDWARD REES.
ROBERT KER, appointed 5th Judge, 19th April.

IN 1815.

J. H. HARINGTON.
JOHN FOMBELLE.
JAMES STUART, absent from 7th November.
WILLIAM EDWARD REES, Officiating, absent from April.
ROBERT KER.

IN 1816.

J. H. HARINGTON.
JOHN FOMBELLE.
JAMES STUART, absent.
ROBERT KER.
GEORGE OSWALD, Officiating Judge, from 4th March, 1816.

IN 1817.

J. H. HARRINGTON.

JAMES STUART, on leave.

ROBERT KER.

WILLIAM EDWARD REES, appointed Judge, 14th November.

GEORGE OSWALD.

JOHN FENDALL, appointed Judge, 9th September.

IN 1818.

J. H. HARRINGTON.

ROBERT KER, absent from 28th April.

WILLIAM EDWARD REES.

GEORGE OSWALD, Officiating.

WILLIAM BLUNT, Officiating Judge, 23d June.

IN 1819.

JOHN FENDALL, appointed Chief Judge, 23d June.

WILLIAM EDWARD REES.

SAMUEL THOMAS GOAD, appointed Judge, 29th January.

WILLIAM BLUNT, Officiating, absent from 29th October.

WILLIAM LEYCESTER, appointed Judge, 26th November.

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CASES

IN THE

COURT OF

SUDDER DEWANNY ADAWLUT.

BYJNATH SING and others, Appellants,

1812.

versus

SYUD HOOSEIN KHAN and other Heirs of NOORROOL HOOSEIN KHAN and ATHUL BEHAREE, Respondents. March 3d.

THIS was an action brought by the appellants as paupers in the Zillah Court of Shahabad, on the 22nd of February 1808, for the recovery of 138 tax free (*mulikana*) villages, of pergunnah Dunwilla (to which Syud Hoosein Khan and others had succeeded as heirs of Noorool Hoosein Khan), and the profits of the same, from the year 1186 to 1215 *Fuslee*; also to recover mouzas Bulwa and Augwan, which had been purchased by the ancestor of Athul Beharee from the said Noorool Hoosein Khan. The value of the former, taken at ten times the yearly produce, was stated at 250,000 sicca rupees; the profits claimed at 800,000, and the value of the latter was estimated at 30,000; making in all, in amount and value sued for, 1,080,000 rupees. This cause being appealable to the Sudder Dewanny Adawlut, was, under the provisions of regulation 13, 1808, transferred from the Zillah Court to the Provincial Court of Patna.

It was set forth in the plaint, that the lands in question had, for many centuries, been the property of the plaintiff's family; but that, in the time of Kasim Ali Khan, on account of the tyranny of the then existing government, the plaintiffs ancestors fled, along with many of the chief proprietors of Shahabad, to Bansee, in zillah Juanpore; that on the victory of Jafier Ali and the English, they returned; but that in consequence of their refusal to engage for the revenue of their estates, on the terms required of them, a settlement of the entire sircar Shahabad being made with Rajah Bekramajeet and Baboo Gujraj, as sudder zemindars, they again returned to Bansee, A.D. 1762-3, that Noorool Hoosein Khan, who had been appointed *Sezuwul* of sircar Shahabad, took advantage of their absence and his official situation, and unjustly gained possession of their zemindaree in the *Fuslee* year 1174;

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Sing and
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Syud Hoo-
sein Khan,
and others.

that in 1189 *Fuslee*, Soothur Sing, the father of the appellant Byjnath Sing, having presented a petition to Mr. Hastings, claiming to be put in possession of the lands in question, an investigation was ordered; that under this order Mr. Meicer, the chief of Patna, transmitted a report, together with his proceedings; from which it appeared, that the claim of Soothur Sing was well founded, but that Soothur Sing having then demised, and the heirs of the family being minors, their claim was neglected, and Noorool Hoosein continued in possession; that the *malikana* villages in question having been granted to Noorool Hoosein Khan, in lieu of the zemindary right to the lands of the plaintiffs, they were entitled to the same, and the mouzas held by Athul Sing having been purchased from Noorool Hoosein, while he had no legal title to them, the sale was void; and they had therefore brought the present action for the recovery of the lands specified.

The defendants, after a general denial of the plaintiff's statement, respecting the fraudulent acquisition of Noorool Hoosein Khan, pleaded, that the suit of the plaintiffs could not be entertained after the lapse of so many years; Syud Hoosein and the other heirs of Noorool Hoosein Khan having succeeded in March 1795, and Nitauund, the father of Athul Sing, having purchased the mouzas now in the possession of Athul Sing, in the year 1776; the former thirteen years, the latter thirty-years, before the institution of this suit.

From the exhibits in the case, it appeared, that in November 1769, Rajah Bekramajeet and Baboo Gujraj (who were then sudder or head zemindars, and who had entered into engagements for the revenue of the whole of *sircar* Shahabad with Government), having fallen in arrears, had transferred for 120,000 rupees, to Noorool Hoosein Khan, the zemindaree of the plaintiffs, from whose *gomasthas* (the plaintiffs being then absent) they had received bills of sale for the land, executed in their own favour; that under this sale Noorool Hoosein Khan obtained possession; that on the 28th of June 1771, the Provincial Council of Patna issued a *sunnud*, under the signatures of the members and of Maharajah Shetab Rai, confirming Noorool Hoosein's right to the zemindaree under the above sale, and dismissing the complaint of Hunooman Rai, a relation of the present plaintiffs, who, on behalf of himself, Soothur Sing, Bhara Sing, and the other sons and grandsons of Bhowanny Sing, had sued for the recovery of the zemindaree; that in 1776, Noorool Hoosein Khan sold the mouzas Bulwa and Awgwari to Nitauund, the father of Athul Sing the defendant, who succeeded on his father's death in 1188, 1781-2: that in the year 1775, the lands in question being held *khas* by Government, an allowance, as *malikana*, was awarded to Noorool Hoosein Khan, as proprietor; in lieu of which allowance, the villages in dispute were granted to him to hold as *nancar*, under a *sunnud* of the Patna Provincial Court, dated the 8th of September 1777; that in the year 1782, Noorool Hoosein Khan having applied to Government for a *dewanny sunnud*, in confirmation of the above; Soothur Sing, the father of the appellant Byjnath Sing, and Goordut Sing, the son of Soothur Sing's elder brother, presented a petition to the chief at Patna, Mr. Brooke, setting forth the right

of their family to the zemindaree, in lieu of his proprietary right to which, Noorool Hoosein Khan then held the *nancar* villages, and praying that they might be put in possession, and Noorool Hoosein ejected; that the above petition having been submitted to Government, an order was issued to the chief of Patna on the 5th of August 1783, directing him to summon the parties and take such evidence as was offered or might appear necessary for ascertaining the validity of the sales of the plaintiffs lands, executed by Bekramajeet and Gujraj, in favour of Noorool Hoosein Khan. It appeared, from the proceedings held accordingly, doubtful, how far the *gomashitas* of the plaintiffs had been empowered to sell their lands in their absence to the *sudder* zemindars abovementioned; whether or not the arrears, for the discharge of which the plaintiff's lands were sold, had accrued on those lands; and (the sales having taken place while Noorool Hoosein Khan was either *Sezawul* or farmer of the revenue for the whole *sircar* of Shahabad;) whether no improper influence had been used in order to obtain the execution of the above sales. The Government, under these circumstances, on the 11th of February 1786, passed an order, directing the chief of Patna to publish an advertisement, allowing to Soothur Sing, Goordut Sing and others, heirs of Bhowanny Sing, three months, from the date of the publication, to prefer their claim to the mouzas then held by Noorool Hoosein Khan, in the Dewanny Adawlut of Patna, and apprising the claimants that, on their failure to proceed as above, within the time limited, their pretensions would be for ever after inadmissible. On the 12th of August 1786, a proclamation, in the terms of the above order, was published, and no claim having been preferred under it, Mr. Mercer, chief of Patna, on the 14th of December following, passed an order, declaring the claim of the petitioners for ever after inadmissible: a period of more than twenty-one years from that time had elapsed before the present suit was instituted.

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Byjnath
Sing and
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Khan and
others.

It appeared from the admission of the plaintiffs themselves, that at the time of the above proclamation, Byjnath Sing, one of the plaintiffs, was a farmer of the public revenue, and upwards of twenty years of age, and that he could hardly have been unacquainted with the terms of the proclamation; and the other plaintiffs having failed to shew any sufficient cause, why so many years were allowed to elapse without their preferring the claim, the Provincial Court were of opinion, that the claim of the plaintiffs was barred by the rule of limitations, and dismissed the suit.

On appeal to the Sudder Dewanny Adawlut, the Court (present J. H. Harington), concurring in the above decision, affirmed the decree of the Provincial Court, and dismissed the appeal.

1812.

Mar. 17th

* BULRAJ RAI (pauper), Appellant,
versus
PERTAUB RAI and others, Respondents.

A, having borrowed money of B, pledges certain lands to him, and goes on a pilgrimage. After 50 years, in which A is not heard of, his heirs sue to recover the land on payment of amount borrowed; adjudged on presumption of A's death, and the claim not being barred by the rule of limitations.

THIS was an action brought by Bulraj Rai, on the 16th of December 1806, in the Zillah Court of Goruckpore, to recover from the respondents, possession of three beegahs, nineteen biswas of land, situate in mouza Jokee, pergunnah Deogang; the yearly produce of which was estimated at five rupees.

It was stated in the plaint, that Ajubee Rai, the plaintiff's uncle, had pledged the lands in dispute, to the defendants grandfather for five rupees, under a general condition, that whenever he should repay the money, he should be entitled to redeem the lands; that the plaintiff, as heir to his uncle (who, not having been heard of for fifty or sixty years, must be presumed to be dead), had offered to pay the amount of the debt; but that the defendant having refused to accept of it, and to restore the lands, he now sued to compel them to do so.

The defendants resisted the claim, stating that Ajubee Rai having for several years lived with the defendants grandfather, Soobuns Rai, had, fifty or sixty years previous to the institution of this suit, when on the eve of a pilgrimage to Jaggernath and other holy places, made over by a deed of gift, the full proprietary right in the lands claimed to Soobuns Rai; from whom he received such sums of money as were required for his expences on the road: that under that deed, the land in question had been in possession of the defendants family ever since.

The deed under which the defendants claimed to hold the land in dispute, and which was filed by them in the cause, was in the following words:—"I, Ajubee Rai, have given in trust (orig. *sompa*) my land, to Soobuns Rai, with all the right I possess therein: when I come back, I shall receive it again, but till I come back it will remain in trust (*amanut*) with Soobuns Rai. If any one in my absence shall demand, let him not obtain it."

The above deed was dated the 9th of *Kartick*, of the year 1807 *Sumbut*, answering to the year 1751-2. It appeared, that Ajubee Rai, the plaintiff's uncle, had never returned from the pilgrimage abovementioned, nor had he been heard of since. The Zillah Judge observed in his decree, that the above deed was merely a deed of trust or deposit (*amanut-nameh*), that the defendants having held possession of the land under such deed; the limitation of twelve years could not be considered under clause 1, section 3, regulation 2, 1805, as applicable to the claim of the plaintiff; and that the plaintiff being sole heir of Ajubee Rai (since whose departure more than fifty years had elapsed without any information of his being alive having been received), was entitled to recover. Possession of the disputed lands was adjudged accordingly to the plaintiff, on payment of five rupees, the sum in which Ajubee Rai had been indebted to the defendants grandfather.

On appeal to the Provincial Court, that Court, in a decree reciting that clause 1, section 3, regulation 2, 1805, was not applicable

to the present suit, reversed the decree of the Zillah Court, and dismissed the claim. 1812.

On petition to the Sudder Dewanny Adawlut, the Court called on the Provincial Court to state at length the grounds of their opinion. Bulraj Rai,
v. Pertaub
Rai and
others.

The Provincial Court, in reply to the above requisition, stated the following reasons, as the grounds on which their decision was founded: 1st, That the plaintiff had brought his action on the plea of the lands being held under a mortgage. 2nd, that the defendants had, for more than forty years, held possession under the deed, which was worded like a deed of gift, and which had been so considered by the defendants. 3dly, that clause 1, section 3, of the above regulation, appeared to refer exclusively to cases of possession acquired by violence, fraud, or other unjust and dishonest means, none of which grounds of redemption are alleged to exist in the present case.

On a further petition to the Sudder Dewanny Adawlut, the Court (present J. H. Harington and J. Stuart), admitted a special appeal, with a view of determining the difference of opinion respecting the applications of the provisions of regulation 2, 1805, to this case, which had led to the contradictory decisions of the Zillah and Provincial Courts. On going into the case, it appeared to the Court, that under clause 4, section 3, regulation 2, 1805, which provides that no length of time "shall be considered to establish a prescriptive right of property, or to bar the cognizance of a suit for the recovery of property in cases of mortgage or deposit, wherein the occupant of the land or other property may have acquired or held possession thereof as mortgagee or depositary only without any proprietary right, &c." the present suit was clearly cognizable; the deed under which the possession of the land was vested in the defendants appearing to be merely a deed of deposit.

The Court accordingly reversed the decree of the Provincial Court, and affirmed that of the Zillah Judge, adjudging possession to the appellant on payment of five rupees. Costs of suit in all the Courts were made payable by the respondent.

1812. GOLOKNATH RAI^o and KALEEPPERSHAD RAI, Appellants,
versus

Mar. 17th.

MIKRAJ, Banker, Respondent.

The mortgage or conditional sale of land by an agent set aside, it appearing that he had no special powers from the proprietor for that purpose; the consideration being inadequate, and the execution of the deed of sale being irregular. But the mortgage money ordered to be refunded with interest.

THIS was an action brought on the 17th of May 1802, in the Zillah Court of Poonea, by Balkishen, *Gomashta*, on the part of the banking house of the respondent, against Goloknath, Mussumaut Umbika and Kaleepershad Rai, to recover certain villages, paying an annual revenue of 3,195 rupees, 3 anas, 3 pies, 2 gundas, which were stated to have been conveyed to the plaintiff by a deed of conditional sale, the term of which had expired. The two latter defendants (Mussumaut Umbika and Kaleepershad) are the widow and adopted son of Sreenath, deceased, and possessed by succession from him a share of pergunnah Akberpoor; Kaleepershad was at the time of the institution of this suit a minor, and Umbika had been invested by the Court of Wards with the management of the hereditary estate, on the 9th of September 1800. Goloknath, the other defendant, also held a share of the same pergunnah, and is natural father of Kaleepershad, and full brother to the aforesaid Sreenath. The villages claimed, named Debeepoor and Demaipoor, form a part of the pergunnah Akberpoor, and were formerly the separate estate of Radhanath Rai, deceased. They had been sold in satisfaction of a decree of Court, and purchased in the name of the defendants, Umbika and Kaleepershad, at public auction on the 11th of December 1800, for the sum of 4,775 rupees. The plaintiff set forth, that on the 17th *Poos* 1207, B.S. corresponding with the 19th of December 1800, Goloknath, in the name and on the behalf of the other defendants, borrowed of the plaintiff the sum of 3,001 rupees, and by way of security, delivered to him a deed of conditional sale of the villages Debeepoor and Demaipoor, with the seals and signatures of the other defendants annexed; covenanting that the sale should be absolute, on default of repayment of principal and interest, on or before the 30th *Bhadoon* 1208, or 13th of September 1801; that the above deed was formally registered, and the money paid in the register's office, to Buddun Lochun, constituted attorney of the defendants, in the presence of Goloknath; that the term had now expired without tender of repayment. The plaintiff concluded with praying enforcement of the condition and possession of the estate. Goloknath and the other defendants replied separately, but concurred in denying, 1st, all knowledge of the specific transaction; and 2d, any authority in Goloknath to alienate or dispose of the property of the other defendants.

In proof of the transaction, the plaintiff exhibited a deed of conditional sale, bearing date 17th *Poos* 1207, with the seals of Umbika and Kaleepershad annexed, and their signatures underwritten. The above deed acknowledged the receipt of 3,001 rupees, and declared the sale absolute, on default of repayment of that sum with interest, on or before the 30th *Bhadoon* 1208. The signature of Goloknath was affixed thereto as a subscribing witness, with the addition of "agent for 1 ana, 4 gunda share of *talooka* Akberpoor;" namely, the estate to which the two other defendants

had succeeded by the death of Sreenath. The deed was registered in the office of Purnea on the 2d of January 1801. The plaintiff also proved by parol evidence, and reference to the records of the register's office, that Goloknath himself brought the deed to Purnea, together with two other subscribing witnesses, and a power of attorney to Buddun Lochun, to effect the registry of the deed; also that the deed was registered, and the money received by Buddun Lochun in the register's office; Goloknath being present, and consenting; also that the money was applied by the direction of Goloknath partly to the payment of arrears of revenue due on the estate of the two latter defendants, and of one held by Goloknath in the name of Buddun Lochun; and partly to the discharge of a private debt due by Goloknath to another person. The plaintiff, moreover, called evidence to prove the hand-writing of Goloknath on the deed, who deposed that the signature of the two other defendants were also in his hand-writing, though without the statement of the name of the writer, as customarily added to signatures by proxy. The plaintiff did not allege, that any special authority had been given to Goloknath, but affirmed, that the execution of the deed in question came within the general powers vested in that person by the other defendants. In proof of this, the plaintiff exhibited a petition presented by the two latter defendants to the Collector, wherein Goloknath is denominated the general agent (*Mokhtarkar*) of Umbika and Kaleepershad; he also called a number of witnesses, whose depositions went to shew the connection of Goloknath with the two other defendants, their residence together, and his administration of the revenues of the estate, and adjustment of accounts on their part; some of these witnesses likewise stated that he had possession of their seals. No evidence was offered by the defendants.

1812.

Goloknath
Rai and
Kaleeper-
shad Rai,
v. Mikraj.

The Zillah Judge being satisfied with the evidence to the execution of the conditional deed of sale by Goloknath, and being of opinion, that it was valid and binding on the other defendants, passed a decree, adjudging possession of the lands in dispute to Mikraj, who, on the death of Baikishen pending the suit, was admitted to succeed as plaintiff; costs of suit were made payable by the defendants. On appeal to the Provincial Court by Mussumaut Umbika and Kaleepershad Rai, that Court concurring in the opinion of the Zillah Judge, affirmed the decree, dismissing the appeal with costs; and directing the appellants to account for the mesne profits which had accrued from the date of the Zillah decree. The addition of the mesne profits bringing the account decreed above 5,000 rupees, the case became open to an appeal of course to the Sudder Dewanny Adawlut, and Mussumaut Umbika having demised, a further appeal was preferred to this Court by the surviving appellants. On a full consideration of the case, the Court of Sudder Dewanny Adawlut (present J. H. Harrington and J. Fombelle) concurred with the Zillah and Provincial Courts, in admitting as sufficient, the evidence to the execution of the conditional deed of sale by Goloknath Rai, and the payment of the money by Baikishen. The Court, however, disallowed the claim of the respondent to possession of the lands in dispute under the deed in question. The grounds of this deci-

1812. *Goloknath Rai and Kaleepershah Rai, v. Mikraj.* sion were thus stated in the decree : " It appears to the Court not to be established, that Goloknath had authority to execute the deed of mortgage for the disputed lands; his having signed the said deed with the names of Kaleepershah Rai, a minor, and Mussumaut Umbika, his mother, without the usual addition of the name of the scribe, to shew that it was signed by proxy, is irregular and liable to suspicion of fraud. A deed thus defective cannot be admitted as sufficient to support a judgment foreclosing, on the inadequate consideration of 3,001 rupees, the conditional sale of lands, purchased at public sale for the sum of 4,775 rupees, only twenty days before the execution of the deed." The Court, accordingly reversed the decrees of the Zillah and Provincial Courts; and adjudged the appellants to pay to the respondent the sum of sicca rupees 3,001, with an equal amount of interest; directing, that in the event of the appellants not agreeing among themselves as to the proportion of the above sum payable by each respectively, the Zillah Judge should take evidence to the appropriation of the money paid by Balkishen Doss, and report the result, for the final orders of the Court. Costs of suit in all the three Courts were made payable by the parties respectively.

1812. *HURISCHUNDER CHUTTERJEE, Appellant,*
versus
 Mar. 20th. *MUDHOOSOODUN SOONDUL (Son of SHEORAM SOONDUL), Respondent.*

Lands lying within the limits of a certain village, do not necessarily appertain to the public purchaser of that village, provided it shall appear that those lands have been assessed as part of another estate. THIS was an action brought by the appellant in the Zillah Court of Nuddea, on the 21st of June 1805, to recover possession of 210 beegas, 8 biswas of land, the yearly rent of which was stated by the plaintiff at 93 rupees, 12 anas, 7 pie, 2 gundas. The parties in this cause had purchased at public sale separate portions of the same pergunnah (Ookrah) forming a part of the zemindary of Nuddea, which had been sold by the collector, in satisfaction of arrears of revenue. The estate purchased by the plaintiff was named Dehee Oolasee; that of the defendant Baghancharah. The land in dispute lay within the limits of mouza Brinee, one of the villages of Baghancharah; but the plaintiff alleged, that, as it formed part of an ancient farm, held by one Jugnath Pal Jotdar, a resident of Tawurah (one of the villages of Oolasee), at the treasury of which the entire rent of Jugnath Pal's farm had been payable, while both villages belonged to the same estate, it had been sold as part of Oolasee's estate, and that the defendant having wrongously taken possession, he now sued for the recovery of it. The defendant denied the statement of the plaintiff, and resisted his claim, stating that the entire property of mouza Brinee, including the lands held therein by Jugnath Pal, had been transferred to him (the defendant), and that the plaintiff could only justly claim the property of that portion of Jugnath Pal's farm which lay within the portion of pergunnah Ookrah, which he had purchased. The Zillah Judge admitted the fact, that the entire rent of Jugnath

Pal's farm had been included by the collector in the estate sold to the plaintiff, yet he was of opinion that the land in question being included in mouza Birnee, which appeared to have been transferred in full right of property without any reservation to the defendant; the claim of the plaintiff for any portion of the mouza so transferred was inadmissible, and he accordingly dismissed the suit, with costs. On appeal to the Provincial Court by Hurischunder, that Court concurred with the Zillah Judge in rejecting the plaintiff's claim, on the ground that the land in dispute being acknowledged to belong to Birnee, was a parcel of the defendant's estate; and no formal separation being alleged to have taken place, the plaintiff's claim to it, as forming part of Jugnath Pal's farm, could not be allowed.

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Hurischunder Chatterjee, v. Mudhoo-soodun Soondul.

On petition for a special appeal, the Court of Sudder Dewanny Adawlut not being satisfied with the grounds on which the decisions of the lower Courts were founded, but on the contrary, being of opinion from the papers then exhibited, that there was reason to believe, that the lands in dispute had been included in the plaintiff's estate, and excluded from that of the defendant by the collector, at the time of making the sale, under which both parties held, admitted a special appeal. On going into the evidence, the facts of the case appeared to be as follow: While the whole of the *pergunnah* of Ookrah belonged to the same estate, the entire rent due from the farm of Jugnath Pal, amounting to 281 sicca rupees, 9 anas, 13 gundas had been payable at the *cutcherry* of mouza Tawurah, although the land composing the said farm lay in four several *mouzas*. In the year 1203, B. S. the abovementioned *pergunnah* being advertised for public sale, under the orders of the Board of Revenue, in several distinct lots; the several villages in which the lands of Jugnath Pal's farm lay were included in different lots; the collector, however, in consequence apparently of the arrangement before adopted by the *zemindar*, included in the lands belonging to Dehee Oolasee, the entire farm of Jugnath Pal, along with the mouza Tawurah. Thus, in the English statement of the assets of mouza Tawurah, submitted to the Board of Revenue previous to the sale, the revenue assessable on that village was stated at 451 sicca rupees, 4 anas, 1 gunda, which was composed of the two *sums*, 169 sicca rupees, 10 anas, 2 gundas, on account of the proper lands of that village, and 281 sicca rupees, 9 anas, 11 gundas, on account of the farm of Jugnath Pal. In the Bengal records of the settlement made at the time of the sale, the above items in the assets of Oolasee were entered separately; the latter being denominated *Jumma of Jugnath Pal*; and (though without specification of any of the lands whence that *jumma* was derived) confessedly including the rent derived from that portion of the farm of Jugnath Pal which formed the subject of the present action. In the record of the assets of mouza Birnee, which were taken at the sum of only 285 sicca rupees, 13 anas, 10 gundas, there was no mention of any part of the farm of Jugnath Pal, although the assets appeared to be accurately calculated on the lands held by the other cultivators. From these documents, and the other evidence, it appeared indisputably to be established, that at the original sale of Dehee Oolasee and Baghaucharah, which occurred in 1203, B. S. the

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Soondul.

whole of the lands held by Jugnath Pal had been transferred to the purchaser of the former. Several successive public sales of these estates had subsequently taken place, at the last of which the parties in the present suit had respectively become purchasers. In the papers connected with these sales, which were filed in the cause, there was no specification of the assets of the several villages, of which the estates were composed, but the revenue assessed on each estate remained the same as that fixed in 1203; and there appeared every reason to believe, that the parties in the present suit had merely succeeded to the rights conveyed to the purchasers of their respective estates at the sale of that year, and that, accordingly, for some years subsequently to the defendant's purchase, the rent of the land in dispute had been collected on account of the proprietor of Dehee Oolasee. The respondent attempted to prove, that the appellant had received an abatement of the revenue payable by him to Government, on account of the land in dispute being excluded from his estate, and included in the defendant's subsequently to the sale; but he entirely failed to establish his plea, while, at the same time, he did not allege that the assets of mouza Birnee were not fully adequate to the sum at which they had been recorded in the papers of the collector at the time of the sale in 1203. The Court were satisfied that the lands in dispute were included in the estate purchased by the appellant, and excluded from that of the respondent, as detailed in the papers, on the faith of which both parties had obviously made their purchase, and they did not consider the circumstance of these lands being within the limits of the mouza Birnee purchased by the defendant (the assets of which had obviously, at the first separation of the villages, been calculated, exclusively of the lands in dispute), as sufficient to bar the plaintiff's right. The Court (present J. H. Harington and J. Stuart) accordingly passed a final decree, reversing the decisions of the Zillah and Provincial Courts, and adjudging to the appellant the proprietary right in the lands in question, together with mesne profits, up to the date of the execution of the decree. Each party was adjudged to pay his own costs.

GUNGADUTT JHA, Appellant, .

1812.

versus

SREENARAIN RAI and MUSSUMMAUT LEELLAWUTTEE, April 24th.
(widow of LULLUTNARAIN RAI), Respondents.

THIS was an action brought by Gungadutt Jha in the Zillah Court of Purnea on the 18th of January 1805, against Sreenarain Rai and Lullutnarain Rai, for the recovery of the estate, real and personal, of the late Rajah Indernarain, vacated by the death of his widow, Raneer Inderawutty; estimated in amount and value at 692,840 sicca rupees, 3 anas, 17 gundas. The plaintiff claimed as heir to the estate of Rajah Indernarain, the Raneer's husband, to whom he was maternal first cousin, viz. son of the sister of Indernarain's mother.

The defendants were lineally descended from Sumroo Chowdry, paternal great grandfather of the great grandsire of Rajah Indernarain. The estate in dispute, the zemindary of Havelee Purnea, is partly situated within the limits of the province of Bengal, and the late Rajah and Raneer, as well as the parties in this cause, were resident within that province; but all religious ceremonies, and those of a civil nature, including marriage, were performed in the families of both appellant and respondent (as they had been in the family of the late Rajah and Raneer, whose ancestors came into Purnea from the adjacent district of Mithila or Tirhoot) by a Mithila *Purohit*, or priest, according to the *shasters* current in that district. On a reference by the Zillah Judge to the pundit of the Court, with the view of ascertaining the Hindoo law in this case, he delivered the following *vyuvustha*: "Indernarain Rai died without leaving a son, grandson or great grandson; this property came to his wife. There being no kinsman to her husband within the relation of brother's son, Sreenarain and Lullutnarain (defendants) are the *sapindas* (connected by funeral oblations) and succeed to his property. They surviving; Gungadutt Jha, the son of Indernarain's mother's sister, who is among the *Bundhus* (*cognates* or maternal kindred,) does not succeed." *Vyuvusthas* of several pundits, in which the right of the plaintiff was upheld, having been exhibited by the plaintiff; the Zillah Judge transmitted the genealogical tables of the parties, together with the above *vyuvusthas*, to the Provincial Court of Moorshedabad, and subsequently to the Court of Sudder Dewanny Adawlut, for the opinion of the Hindoo law officers of those Courts. The *vyuvustha* of the pundit of the Provincial Court of Moorshedabad was to the following effect: "The widow of Rajah Indernarain possessed her husband's estate. After her death, there survived the maternal first cousin of her husband, and the descendants of her husband's ancestor (in the 6th degree.) In this case, the maternal first cousin is entitled to offer funeral oblations and recover the estate." The *vyuvustha* of the pundits of the Sudder Dewanny Adawlut, in answer to the reference of the Zillah Judge, was to the following effect: "After the death of Raneer Inderawutty, widow of Rajah Indernarain, there being no descendant in the relation of brother's son; the *vyuvustha* declaring the right of Sreenarain and Lullutnarain,

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ant Leel-
lawuttee.

the *sapindas* of her husband, to the estate left by the Rajah, and possessed by the Ranee, is correct, according to the *Bibada Chintamani*, and other books current in the district of Mithila. The *vyuvustha* which declares the right of Gungadutt Jha, son of the Rajah's maternal aunt, who is therefore a *Bundhu* (cognate) of the Ranee's husband, is not to be approved; that exposition of the law, however, is in conformity with the *Dayabhaga*, *Daya Tutwa*, and other books current in Bengal."

The Zillah Judge, under the above opinion of the pundits of the Sudder Dewanny Adawlut, passed a decree, dismissing the plaintiff's suit, with costs.

On appeal to the Provincial Court of Moorshedabad, the First and Second Judges of that Court having made another reference to the pundits of the Sudder Dewanny Adawlut, for a more specific detail on the grounds of their opinion in favour of the respondents, a *vyuvustha*, to the following purport, was delivered: "That the parties being of a Mithila family, and performing their ceremonies according to Mithila *shasters*; the case ought to be decided according to the books current in that district: that, according to the received and most authoritative books of law of the Mithila system, which was current in Poornea also, the paternal kindred are entitled to succeed before the maternal relations, and that consequently the appellant had no legal right to the succession claimed by him." The Provincial Court, in conformity with the above *vyuvustha*, passed a decree affirming the decision of the Zillah Judge, and dismissing the appeal with costs.

A further appeal was preferred by Gungadutt Jha to the Court of Sudder Dewanny Adawlut. The Court (present J. H. Harrington and J. Stuart), under the opinion of the Hindoo law officers, and on reference to a former decision in the case of Rajchunder v. Gocul Chund Goh, passed on the 22nd of June 1801, (on which occasion it had been determined, that if a person of a Mithila family, living in Bengal, have a Mithila *Purohit*, and perform the ceremonies usual on occasions of joy and mourning, according to the Mithila *shaster*, his right of inheritance and other claims are determinable by the law authorities current in that country) were clearly of opinion, that the decision in the present case should be governed by those authorities; it having been clearly ascertained, that the usages of Mithila had continued to be practised in every respect by the parties. With a view, therefore, to ascertain the law as applicable to the case, according to the best authorities of that system, reference was made to the Patna Provincial Court and to the Judge of Zillah Tirhoot, to obtain *vyuvusthas* from the pundits of those Courts.

In the replies to those references, many texts were cited to show, that, according to the Mithila authorities, the estate of a person, on failure of heirs within the relation of brother's son, devolves on the paternal kindred, who are *sapindas*, which relation includes the descendants of a paternal ancestor to the sixth degree, and ceases with the seventh person; in default of *sapindas* on the *samano-dacas*, or those connected by a common libation of water, viz. the more distant paternal kindred extending to the fourteenth degree, and in failure of *samunodacas*, to those termed *bandhus* or cognates.

The appellant belonged to the latter description of relations. The Court of Sudder Dewanny Adawlut, under the above *vyuvasthas*, being of opinion, after a careful examination of the objections of the appellant, that the right of the respondents was preferable in law, according to the Mithila system, by which the decision of the present case was guided, passed a final decree, affirming the decisions of the Zillah and Provincial Courts, and dismissing the appeal, with costs.

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Rai and
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maut Leel-
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MUSSUMMAUT RAJOO and others, Appellants,
versus
MUSSUMMAUT BUDDUN, Respondent.

1812.

May 8th.

Respondent

THIS was an action brought by Mussummaut Buddun, the respondent, in the City Court of Patna, to recover from the appellants the sum of sicca rupees 1,880, being the moiety of the collections made at a temple dedicated to the worship of Debee, during a period of five years and four months. The plaintiff set forth, that the defendants had unjustly appropriated to themselves the entire revenues of the above religious establishment, to one half share of which the plaintiff had been adjudged entitled by a decree of Court.

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The defendants did not contest the right of the plaintiff to the moiety of the collections in question, but denied that they were equal to the amount claimed. No accounts of the collections in dispute, which were, from their nature, variable, having been kept, nor evidence adduced, by which their amount could, with any accuracy, be ascertained, the City Judge passed a decree, adjudging to the plaintiff the sole enjoyment of the collections for the next five years and four months; a period, equal to the time during which she had been excluded from her legal share; and directing, that, on the expiration of that period, the parties should share equally.

The defendant having appealed to the Provincial Court and subsequently to the Sudder Dewanny Adawlut (present J. Fombelle), the Zillah decree was affirmed in both those Courts with costs.

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period equal to that for which appellant singly enjoyed the same.

1812. RAJAH KASHEENATH RAI, SHEOCHUNDER RAI,
and RAMCHUNDER RAI, Appellants,

May 12th.

versus
NUWAB DILAWUR JUNG, Respondent.

Judgment
in a suit
brought on
behalf of
appellants
by one not
duly au-
thorized on
their part,
held not
to bar
appellants
right of
action.
Appeal
from non-
suit, on
ground of
former
judgments
received as
summary.

THIS was an action brought by the appellants on the 2nd of September 1807, in the Zillah Court of the Twenty-four pergunnahs, to recover the sum of sicca rupees 25,000, on a bond executed by the Nuwab Mozuffer Jung, the respondent's father, in favour of Rajah Ramlochun Rai, father of the appellant Rajah Kasheenath Rai, and uncle to the two other appellants. The respondent resisted the claim, stating, that having inherited no property from his father, he was not answerable for his debts; and pleading further, that the present suit having been before heard and determined, could not now be entertained.

It appeared, that in a suit instituted by Bancha Ram Rai (who denominated himself attorney for Kasheenath and Sheochunder Rai), against the Nuwab Dilawur Jung, for the recovery of sicca rupees 70,000, on four bonds, of which that, whereon the present action was founded, was one; a decree had been passed by the then Judge of the Twenty-four pergunnahs, on the 26th of September 1796, dismissing the plaintiff's claim on the following grounds: First, that it is provided in section 2, regulation 4, 1793, that no complaint is to be received, but from the plaintiff or his *vakeel* duly empowered; and that Bancharam had not exhibited any power of attorney, nor proved his authority to act in the suit, on behalf of Kasheenath and Sheochunder Rai; and secondly, that he had failed, when called on, to prove that the Nuwab Dilawur Jung had inherited any property from his father Mozuffer Jung. The above decision was affirmed, on appeal by the Provincial Court, in a decree, under date 28th of December 1797, reciting, merely, that on a consideration of the papers, the decree of the Zillah Judge appeared right.

The Zillah Judge being of opinion, that the above decision precluded the present suit from being entertained, dismissed it with costs. And on appeal to the Provincial Court of Calcutta, that Court concurring in the opinion of the Zillah Judge, affirmed his decree, dismissing the appeal with costs.

A further appeal was preferred to the Sudder Dewanny Adawlut, on the ground, that no decision having been passed on the merits of the case, but the suit of Bancharam dismissed on the ground of his having no authority to act for the appellants, who were then minors; the former decrees of the Zillah and Provincial Courts could not preclude appellants from prosecuting the present claim.

The Court of Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) were of opinion, that Bancharam, the plaintiff in the former cause, having been declared incompetent to sue for the appellants; the dismissal of the suit, though not founded solely on that consideration, could not operate to preclude a trial of the merits of the present suit, instituted by the real claimants, and accordingly reversed the orders of the Zillah Judge, and Provincial Court of the 22nd of February 1808, and 21st of August

1811, respectively; and directed the Provincial Court to try the merits of the appellants claim, notwithstanding the decision of the Zillah and Provincial Courts of the 20th of September 1796, and 28th of December 1797. Costs were made payable by the respondent. 1812.

The Court (Chief and Second Judge) were of opinion, that the merits of this cause not having been investigated, the appeal ought, under the spirit of section 8, regulation 2, 1801, to be admitted as summary. No institution fee was therefore required from the appellants. *Rajah Kashee-nath Rai, and others, v. Nuwab Dilawar Jung.*

J. H. HINCH, Appellant,
versus
C. SONNINGSEN, Respondent.

THIS was an action brought by the respondent C. Sonningsen, A (the owner of a ship) in the European Court of Chinsurah, to recover from J. H. Hinch, the appellant, the sum of 9,215 rupees, 9 anas, 4 gundas on account of freight of the ship Amazon, which had been chartered by the plaintiff to the defendant, together with the further sum of sicca rupees 10,000, as penalty for the breach of the conditions of the charter-party of the ship in question. *of exchange in favour of his agents and creditors on B, (the freighter) payable on the discharge of the ship or her return to port. The obligation was voided by the loss of the ship, but the house of agency, in whose favour the bill was drawn, had insured freight equal to its amount. In a suit by A against B, for the recovery of freight, which had accrued, while the ship was in the employ of B, held, that B cannot plead*

The defendant resisted the claim, stating the sum of 5,099 rupees, 4 anas, 5 gundas to be due to him from the plaintiff, on account of money advanced beyond what was justly due as freight of the said ship, and claiming to recover the penalty forfeited by the non-fulfilment of the charter-party, on the part of the plaintiff. The claim, on account of the penalty set up by both parties, being wholly unsupported by evidence, and not insisted on by either side in appeal, it is not necessary to state the grounds of the demand.

The following were the circumstances attending the charter of the ship Amazon, and the voyage undertaken in consequence, which gave rise to the present suit. On the 24th of May, 1806, a charter-party was executed between the plaintiff, who was owner and master of the ship Amazon, and the defendant, a Danish merchant of Serampore; by which the plaintiff chartered the said ship to the defendant, for a period of eight months, or such longer period as the freighter chose, to sail to any port or ports to the Eastward of the Cape of Good Hope, under the following conditions: 1st, The freight of the ship to be paid at the monthly rate of 5,000 sicca rupees (to commence on the 9th of June, 1806), during such time (not less than eight months) as she might be in the use of the freighter. 2d, The freighter to advance 20,000 rupees, or such sum (not less than 12,000 rupees) as he might be able; paying the remainder with interest on the arrival of the ship Amazon at China. 3d, The freighter to make a further payment of 20,000 rupees on the arrival of the ship at Manilla. 4th, That, in the event of the voyage being completed in less than eight months, the freighter should still be answerable for the freight for that period, viz. the sum of 40,000 rupees. The defendant accordingly, on the 6th of June 1806, paid in advance to the plaintiff the sum of 14,117 sicca rupees, 12 anas.

1812. Messrs. Hogue, Davidson and Co. having possession of the papers of the ship *Amazon*, in security for a debt due to them by the plaintiff, refused to let her sail until payment of the debt should be made or secured; and the plaintiff accordingly drew a bill for 16,000 sicca rupees in their favour, payable by the defendant, on the condition that the ship *Amazon* performed her voyage from China back to Bengal; the coast of Coromandel or Bombay; or in the event of the defendant's discharging her at any other port. This bill the defendant accepted; the plaintiff agreeing that it should go to the payment of the freight, and entering into a new agreement with the defendant, respecting the mode in which payment should be made, viz. that the defendant should not be bound to pay any further sum at China, but on the arrival of the ship at Manilla, or any other port to which she might be destined from China, he should pay to the plaintiff the sum of 9,882 rupees, 4 anas, making with the money advanced in Bengal, and the amount of the accepted bill of exchange, the sum of 40,000 rupees, or freight for eight months.

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payment,
the sum
received by
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tors of A,
on account
of the
insurance
policy.

The ship *Amazon* reached China, and there landed her cargo in safety. From Canton she took her departure on the 28th of October 1806, bound to Manilla; but was totally lost in her way thither at the island of Haynam, on the 2nd of November following. In consequence of the loss of the vessel, the bill drawn on the defendant in favour of Messrs. Hogue and Davidson did not become payable; but those gentlemen having, on behalf of the plaintiff, made an insurance on account of freight to the amount of the bill, recovered from the insurance office the sum of 15,518 sicca rupees, 13 anas, 9 gundas.

The plaintiff crediting the defendant with the sum of 14,117 sicca rupees, 12 anas, advanced in Bengal, set against it the sum of 23,333 sicca rupees, 5 anas, 4 gundas being the amount of freight due (at the rate of 5,000 rupees *per mensem*,) from the 9th of June, to the 28th of October (a period of four months and twenty days), during which time the ship *Amazon* was in the employ of the defendant, and claimed the difference.

The defendant allowed the above sum of 23,333 sicca rupees, 5 anas, 4 gundas as freight due up to the date of the ship's sailing from China, but claimed the benefit of the amount received on account of the insurance policy by the plaintiff's agents on his behalf.

The Judge of the European Court, on the ground, that the plaintiff having received the sum of 14,117 rupees, 12 anas, advance from the defendant, and 15,518 rupees, 13 anas, 9 gundas on account of the insurance, making in all 29,636 rupees, 9 anas, 9 gundas received on account of the freight, which, from the time of her being first chartered by the defendant, to the day on which she was lost at the island of Haynam, would amount to little more than 25,000 sicca rupees; was of opinion, that the plaintiff could have no claim for freight due, and that at the same time, the defendant and counter-claimant had no right to recover the surplus of over payment for freight; it being drawn from the sum paid by the insurance office. He accordingly passed a decree, dismissing the claims of the plaintiff and defendant, and awarding that neither party should have any claim upon the other.

On appeal by Sonningsen to the commissioner of Chinsurah, it appeared to that gentleman, that the respondent having admitted the appellant's claim of 23,333 rupees, 5 anas, 4 gundas, that claim must be allowed; that the respondent had clearly no right to benefit by the insurance made by the agents of the appellant, with the amount of the premium on which, it was evident the respondent had not been charged: he having deducted the consideration of the policy (1,204 rupees) from the amount of his counter-claim, which would otherwise have been 6,303 rupees, 4 anas, 5 gundas; that it was only made in security of the amount of the bill of exchange, which, from the loss of the ship, had never been paid by the respondent; that consequently the amount advanced in Bengal was the only payment which could be set off against the appellant's claim, and that there remained due a balance of 9,215 rupees, 9 anas, 4 gundas. But it appearing, that sundry disbursements had been made in China by the respondent for ballast and other necessary expences, amounting in principal and interest to 1,919 rupees, 5 anas, 3 cowries; that sum was deducted from the balance due on account of the freight, and the remainder, viz. 7,296 rupees, 4 anas, 1 gunda, was adjudged to be paid with costs of appeal by the respondent.

Mr. Hinch appealed from the above decision to the Sudder Dewanny Adawlut, but that Court (present J. Fombelle) affirmed the decision of the commissioner, and dismissed the appeal, with costs.

1812.

J. H. Hinch,
v. C. Sonn-
ingsen.

GOPEE MOHUN THAKOOR, and LADLEE MOHUN
THIAKOOR, Appellants,

versus

RADHA MOHUN GHOSE, Respondent.

1812.

June 29th.

THIS was an action brought by the appellants in the Zillah Court of Jessore, on the 9th of September 1805, to obtain a measurement and allotment of the rent due on mouza Bakergong, the talook of the respondent, included in pergunnah Russoolpore, the zemindaree of the appellant; and to recover arrears of rent from the respondent, for the years during which the respondent had been in possession of the said talook, without discharging his rent, at the rate which might be found just on the investigation prayed for. The respondent resisted the plaintiffs claim, stating that he was entitled to hold the talook at a fixed rent of sicca rupees 930.

The defendant's claim to hold the talook in question at a fixed rent having been disallowed by a decree of the Provincial Court in a former suit, in which it was established, that the rent payable by him was variable; the Zillah Judge appointed an *aumecn*, with a view of ascertaining the extent and nature of the land included in the defendant's talook. It appeared from the *aumecn's* report, that the defendant's talook consisted of 2,766 beegas. 5 biswas of *malgozarce* land, of which 2,364 beegas. 11½ biswas was rice land; 87 beegas, 19 biswas *bast*, or occupied by ryots; 237 beegas, 6 biswas, *lark putcet*, or waste land recoverable; and that at the

In fixing the rent of a dependent talookdar, the charges of collection and 10 per cent must be deducted from the actual produce of his lands, as directed by regulation 5, 1812.

1812. rates of rent demandable from ordinary ryots current in the pergunnah, the annual rent demandable on such land amounted to 2,405 sicca rupees, 6 anas, 1 gunda, 3 cowries. The Zillah Judge, under the above circumstances, passed a decree, adjudging the above sum as the annual rent demandable by the plaintiff for future years, as well as the rate at which arrears should be adjusted.

Gopee Mohun Thakoor and Lallee Mohun Thakoor, v. Radha Mohun Ghose.

On appeal by Radha Mohun Ghose to the Provincial Court, that Court were of opinion, that the rent due by dependent talookdars ought not to be ascertained by the pergunnah rates which were applicable to the case of common tenants; but that, under the spirit of section 10, regulation 1, 1793, it was to be estimated by adding to the proportionate amount of public revenue, which was assessable on the *mehal* held by the talookdar, a ten per cent allowance as the *malikanah* of the zemindar. The Court accordingly reversed the decree of the Zillah Judge, and directed that the rent payable by Radha Mohun Ghose, might be adjusted on the above principle. The *jumma* payable by the respondent under the orders of the Provincial Court, amounting only to 930 rupees, and that claimed by the appellant, being 2,405 sicca rupees, 6 anas, 1 gunda, 3 cowries, the annual difference, 1,475 sicca rupees, brought the case within the provisions of appeal to the Sudder Dewanny Adawlut, which was accordingly admitted. The Court (present J. H. Haington and J. Fombelle), did not concur in the principle on which the rent payable by the respondent (a dependent talookdar) had been estimated in either of the lower Courts; being of opinion, that the mode of estimation adopted by the Zillah Judge, who had allowed nothing for the profits of the talookdars, nor the expence of collection, was not applicable to dependent talookdars, and that the provisions of section 10, regulation 1, 1793, on which the decision of the Provincial Court was founded, was applicable solely to independent proprietors of estates, holding their lands in full property, subject to public revenue. The Court had already, in the case of Baichanund v. Hurgopal and others, (decided 21st of July 1806,) determined that the annual rent demandable by a zemindar from a dependent talookdar should be fixed on a measurement of the lands, and estimate of their produce, by deducting from the produce ten per cent. as the profit of the talookdars, together with the actual charges of collection; the residue to form the rent demandable by the zemindar. Previous to the decision of this case, regulation 5, 1812, was passed, in the 8th section of which, provision is made for estimating the rent of dependent talookdars on the above principle. The Court, accordingly, taking the gross rent of the rice land and that occupied by the abodes of the ryots (for which alone it appeared the talookdar received rent), as estimated in the report of the *aumeen* at 2,297 sicca rupees, 1 ana, 11 gundas, and deducting therefrom ten per cent, viz. 229 sicca rupees, 11 anas, 4 gundas, for the talookdar's profit, together with 296 sicca rupees, 2 anas, 12 gundas, which was stated in the report to be the amount of the expences of *mofussil* collections, adjudged the remainder, viz. 1,777 sicca rupees, 3 anas, 7 gundas, as the annual rent, according to which the arrears of the period, since the application for a measurement and adjustment to the final decision of the present suit, should be estimated.

GOPEE MOHUN THAKOOR, and LADLEE MOHUN
THAKOOR, Appellants,
versus
RAMTUNNOO BOSE, Respondent.

1812.

June 30th.

THIS was an action brought by Ramtunnoo Bose, against Oojulmunnee, widow of Kishen Kont Sain, in the Zillah Court of Jessore, on the 8th of September 1804, to recover possession of a mouza Rutobia, and certain other lands, situated in pergunnah Yoosepore, the zemindary of the appellants, claimed to be held by the plaintiff, on a talookdaree tenure, at a fixed annual rent of 416 sicca rupees, 1 ana. It was stated in the plaint, that Rajah Sree Kont Rai, the late zemindar of the above pergunnah, had, on the 17th *Poos* 1203, B. S. (28th of December 1796), in consideration of a sum of money paid for the purchase of the tenure, granted to the plaintiff the lands in question, to be held by him as a *muzkooree* or dependent talook, at the annual *jumma* above specified; that the plaintiff had accordingly possessed the lands in question for the years 1203 and 1204; that in the year 1205, Kishen Kont Sain having purchased, at a public sale made by the Sheriff of Calcutta, in satisfaction of a decree of the Supreme Court, that part of the Rajah's zemindaree in which the plaintiff's talook was situated, had unjustly dispossessed him of his talook, for the recovery of which, together with mesne profits, he now brought his suit. The title deed under which the plaintiff claimed, was in the following terms: I, Sree Kont Rai, &c. to Ramtunnoo Bose. I have made over to you as a *muzkooree* (dependent) talook, mouza Rutobia, at an annual *jumma* of 416 sicca rupees, 1 ana. I have received from you as the purchase money of the said talook, sicca rupees 416, and have transferred to you the land lying within the limits of the said mouza (whether productive or waste), the ground occupied by houses and gardens, the water and woods, the piscary revenue, the forest dues, the reed rent, the water dams, the ponds, lakes, &c. All I have made over to you as your *muzkooree* talook, that you and your children possessing and managing the said mouza, may, after paying the rent, enjoy the produce; you are authorized to transfer the said mouza by sale or gift. If I or my heirs lay any claim thereto, such claim shall be void.

The appellants Gopee Mohun and Ladlee Mohun Thakoor having purchased the zemindaree of Kishen Kont Sain before the cause came to a hearing in the Zillah Court, succeeded to the defence of the present suit. They resisted the claim of the plaintiff, stating that the sale by Rajah Sree Kont Rai to the plaintiff was invalid, because, in the first place, the deed of sale, under which the plaintiff claimed to hold the lands in question, was executed subsequently to the lands being put under attachment by authority of the sheriff, in virtue of the writ of the Supreme Court; and secondly, because it is contrary to the provisions of regulation 44, 1793, for any zemindar to dispose of a dependent talook, to be held at any fixed *jumma* for a period exceeding ten years. The plaintiff proved his purchase of the lands from Rajah Sree Kont Rai, as stated in the plaint, and the Zillah Judge being

Claim by respondent for possession of a talook at a fixed rent under deed of sale from a zemindar, whose estate had been sold under authority of the Supreme Court, and purchased by appellants; respondent's title to possession and to mesne profits during the period of disposssession upheld, the rent to be adjusted under the rules of section 8, regulation 5, 1812. Judgment for mesne profits against a third party, not a party to the cause, overruled.

1812.

Gopee Mohun Thakoor and Ladlee Mohun Thakoor, v. Ramtunoo Bose.

satisfied, that the lands in question had not been under attachment by the sheriff of Calcutta at the time when the talookdaree right in them was sold to the plaintiff; and being of opinion, that such sale was, under section 6, regulation 44, 1793, legal; he passed a decree, adjudging possession of the lands sued for to the plaintiff, under the deed of sale executed to him by the late zemindar, Rajah Sree Kont Rai, with costs of suit against the defendants.

An appeal having been preferred to the Provincial Court by Gopee Mohun Thakoor and Ladlee Mohun Thakoor, that Court affirmed the decree of the Zillah Judge, with costs against the appellants, and further adjudged the respondent entitled to recover the amount of the mesne profits derived by the zemindars from the lands in question, during the period of his dispossession, after deducting the rent payable by him under the deed executed by Rajah Sree Kont Rai; and directed that the Zillah Judge should appoint an *aumeen* to ascertain the mesne profits and cause payment thereof from Oojulmunnee for the time during which her husband and herself had possession, and from the appellants for the time they had been in possession.

A petition for a further appeal was preferred to the Sudder Dewanny Adawlut, and the annual rent claimed by the appellants exceeding that due to them under the decree of the Provincial Court, by the sum of 548 sicca rupees, 9 anas, 14 gundas, 3 cowries; the cause came within the limitation of appeals to the Sudder Court, and an appeal was accordingly admitted. The Court had before (see pages 173 and 195, vol. 1st,) determined, that under regulation 44, 1793, a *pottah* for the sale of a talook at a fixed rent in perpetuity was invalid with respect to the fixed rent, but valid for the sale; and accordingly being of opinion, that the sale of the land in dispute by Sree Kont Rai was regular and valid, the Court (present J. H. Harington and J. Fombelle) affirmed the decrees of the Zillah and Provincial Courts, as far as they went to adjudge possession of the lands to the respondent; but reversed that part of them by which the right of holding the lands at a fixed rent was adjudged; and provided in a final decree, that if the parties did not come to an adjustment, the *jumma* of the respondent's talook should be adjusted on a measurement and adjustment in conformity with the principle laid down in section 8, regulation 5. 1812. The Court at the same time provided, that the appellants should, as directed in the decree of the Provincial Court, account to the respondent for the profits of the talook during the time of their possession, in adjusting which the *jumma* specified in the *pottah* of Sree Kont Rai should be adhered to. The Court held that Oojulmunnee not having been a party in the cause either in the Provincial Court or in the Sudder Dewanny Adawlut, nor any one having been present on her part, the profits stated to have accrued to her and her husband could not be regularly adjudged in the present suit, but if refused, must be sued for separately. Costs of suit were made payable by the appellants.

MUSSUMMAUT SABITREEA DAE, Appellant,

1842.

VERSUS

SUTUR GHUN SUTPUTTEE, Respondent.

August 4th,

THIS was an action brought by the appellant on the 9th of July 1805, in the Zillah Court of Midnapore, to recover possession of mouza Burbansee, and sundry other villages, in pergunnah Kundhur, the zemindary of the plaintiff's deceased husband Dhunnajee Sutputtee; the yearly produce of which was stated at 27,525 sicca rupees, 11 anas, 8 gundas, and the public jumma assessable on it at 17,971 rupees, 11 anas, 1 pie. It was set forth in the plaint, that Dhunnajee, the plaintiff's husband, having died without male issue, she was the rightful heir to his estate; that the defendant, the son of Dhunnajee's younger brother Lukkeechurn, had, under fraudulent pretences, obtained from the Collector of the Zillah, possession of Dhunnajee's zemindary, for the recovery of which the plaintiff now sued. The defendant stated in answer, that he was the adopted son of Dhunnajee, and consequently heir to his estate, that Dhunnajee's first wife having died in the year 1187, leaving only a daughter Mohamaya; he married a second wife named Lochna Munnee; that in Kartick 1189, Lochna Munnee bore a son; that he having died a few days after his birth, Dhunnajee was advised to adopt one of his brother's children; that he accordingly obtained the defendant from Lukkeechurn, his younger brother, when he was only eleven days old, and in Aghun of the above year (1189), in concert with Lochna, his wife, adopted him as their son; that in 1194 Mussummaut Lochna, the defendant's adoptive mother, having died; Dhunnajee married the plaintiff, by whom he had issue two daughters; that in 1200, in presence of brahmins and other respectable persons, he invested the defendant with the brahminical string, pierced his ears, and performed the other necessary ceremonies; that Dhunnajee had twice given the defendant in marriage in the years 1204 and 1208, on both of which occasions he had performed the acts usual from a father to a son, the plaintiff likewise then acknowledging him as such: that Dhunnajee having died in Sawun 1210, the defendant had performed all the usual funeral rights as to his father, and under a *purwannah* of the Collector had obtained possession of his estate. Several witnesses were adduced to prove the defendant's title, as adopted son; their evidence concurred generally with the story of the defendant, all agreeing that no ceremony had taken place at the time of the adoption; and no written vouchers regarding it had been executed; but that, when the defendant was 11 or 12 years old, the ceremonies of investiture, &c. had been performed by Dhunnajee, as to his son. The evidence on the part of the plaintiff, on the other hand, went to shew, that the defendant had not been adopted, but was known as the son of Lukkeechurn, the brother of Dhunnajee. The plaintiff likewise filed two documents in proof of the defendant's not being the adopted son of her husband. 1st, the petition of the defendant to the Collector on Dhunnajee's death for possession of his estate; in which, among other things, it was written, "the estate claimed was the talook

1812. of Dhunnajee, my uncle; he was childless; Lukkeechurn is my father. In his life time, and of his own free will, Dhunnajee took me as a son. 2d, a deed of sale for some land in favour of the defendant, under date the 15th *Asin* 1207, in which the defendant is designated Sutturghun, son of Lukkeechurn. The Zillah Judge, in a decree, reciting, "that the evidence of the witnesses to the adoption of the defendant was, from the various contradictions which occurred in it, unworthy of credit; and the fact disproved by documents in which the defendant is designated the son of Lukkeechurn; that, further, it was admitted on the part of the defendant, that at the time of the adoption, none of the usual ceremonies had been used, and that, therefore, even if the evidence of the witnesses were credited, the adoption would not be valid;" gave judgment in favour of the plaintiff for possession of the lands sued for; leaving it to the defendant (whose *vakeel* had stated previously to the decision of the case, that the defendant was entitled to the estate in question in right of succession to his grandfather), to bring a fresh action in support of his claim as heir, independent of the alleged adoption. On appeal to the Provincial Court by Sutturghun Sutputtee, that Court took further evidence as to the allegations, that Dhunnajee had, in the year 1200, caused all the necessary ceremonies to be publicly performed; and that in giving the appellant in marriage he had appeared as his father. The Court being of opinion, that these facts were established by evidence; and that it was likewise proved, that the above deed of sale had been taken by Lukkeechurn in the appellant's name, without his knowledge; considered the appellant's title as adopted son of Dhunnajee to be made out, and accordingly reversed the zillah decree. Mussummaut Sabitreea Daee appealed to the Sudder Dewanny Adawlut; that Court, on a full consideration of the evidence in the case, and allowing the respondent to have further witnesses examined in proof of his adoption, were of opinion, that the fact was not established. The Court founded their opinion, on a consideration of the very gross contradictions into which the witnesses of the respondent fell. It appeared, that most of them were men of low rank, and not likely, therefore, to have been present at the ceremonies which they described to have taken place; and it being established, that the respondent had in the year 1209, obtained a decree in Court, under the above deed of sale, and in the name of Sutturghun, son of Lukkeechurn, that circumstance seemed to afford almost conclusive evidence against the fact of his being the adopted son of Dhunnajee. It appeared, likewise, to the Court, that the adoption was in itself unlikely; Dhunnajee being, at the time when he was stated to have taken the defendant as his adopted son, not more than 30 years of age; his wife Lochna only 17 or 18; and the adoption having been stated to be made by him only a short time after Lochna had borne a son. Under the above circumstances, the Court (present J. H. Harington and J. Fombelle) reversed the decision of the Provincial Court, and affirmed the decree of the Zillah Judge. The respondent having subsequently set up a claim, as heir to the estate, in right of his father, the Court, in giving the judgment on

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the present case, left it to him to bring a fresh action in support of any claim he might have against the estate of Dkunnajee, as heir to his grandfather, or under any other title.

SREENARAIN RAI and Widow of LULLUTNARAIN RAI,

1812.

Appellants,

July 27th.

versus

BHYA JHA, Respondent.

THIS was a suit brought by Bhya Jha, the respondent, in the Zillah Court of Purnea, on the 27th of June 1805, for the recovery of the estate, real and personal, of the late Ranee Indrawuttee; estimated in amount and value at 1,135,693 sicca-rupees, 15 anas, 11 gundas, 1 cowry. The defendants were the sixth in descent from the ancestor of Rajah Indernarain, the late husband of the deceased Ranee, and had been put in possession of her estate as heirs at law to her deceased husband. The plaintiff Bhya Jha claimed as the adopted son, and donee of the Ranee; setting forth that on the 1st *Aughun* 1211, *Moolkee*, (15th of November 1803,) the Ranee, some hours before her death, had, in the presence of her relations and servants, adopted him as her son, and made him *malik* (proprietor) of all her property, moveable and immoveable; and that he had accordingly performed the funeral ceremonies of the deceased as his mother. The plaintiff, at the same time, stated, that on the 27th *Aughun*, of the same year, a *sooluhnama*, or deed of compromise, had been executed between him and the defendants, by which each party had agreed, with the view of preventing litigation, to take half of the property in dispute; that he (the plaintiff) was desirous of maintaining his engagement; but that, as Sreenarain and Lullutnarain had broken their part of the agreement, and he (the plaintiff) had been declared by the Sudder Court at liberty to sue at his own option, either for the entire estate, as adopted son, or for a moiety on the deed of agreement; he now sued for the entire estate in virtue of his adoption. The defendants, in their answer, denied the fact of the plaintiff's adoption by the Ranee, as well as her authority, under the *shaster*, to give away any of the property in contest: and stated, that the *sooluhnama* had been set aside by the Zillah Judge, on proof that it had been executed by them in ignorance of their just rights; and in consequence of intimidation on the part of the plaintiff. A list of witnesses to the fact of the adoption was given in, but previously to their being examined, the cause was removed to the Provincial Court, under the provisions of regulation 13, 1808. A petition was afterwards presented by the plaintiff, stating that his claim was twofold; the one, founded on the adoption, for the whole estate, and the other on the deed of compromise, for the half of it. The *sooluhnama*, or deed of compromise, was filed in the Provincial Court, and was couched in the following terms: We, Sreenarain Rai and Lullutnarain Rai, sons, and Ramnarain Rai (son of the late Deonarain Rai,) grandson, of the late Rajah

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Chundernarain Rai, zemindars of pergunnah Kudweh; whereas, Ranee Indrawuttee, zemindar of pergunnah Haveilly Purnea, &c. having, after a long illness, died on the 1st *Aughun* 1211, *Moolhee*, and in consequence of her having no son, having, on that same day (she being at the time of sound mind and in full possession of her faculties), constituted Bhya Jha (her maternal first cousin) her son by adoption and proprietor of her zemindary, &c.; the said Bhya Jha, after performing the funeral obsequies of the said Ranee, has presented petitions to the Judge and Collector, praying to be permitted to assume the management of the said zemindary, and to possess himself of the whole property, moveable and immoveable, to the exclusion of all other persons, in like manner as they were possessed by the said Ranee: and whereas, we are descended from the same common stock with the late Rajah Indernarain, the husband of the said Ranee, and are thus entitled to succeed to his property, and Bhya Jha is entitled to the same in virtue of the adoption; as well as to the Ranee's estate from his near relationship; and whereas the contest for so great a zemindary carried from the district to the presidency, nay, even to England, would require the age of Noah to prosecute it to a close, would create much anxiety and care, would uselessly consume our existence, and, after all, would resemble the dispute of Omar and Zeyd; considering these things; considering moreover that life is unstable and precarious, and that no worldly object is worth attaining at the expence of family discord; that such contest would have the effect of affording a triumph to malice and envy; of entailing ruin on the litigant parties, and of staining with dishonour an illustrious family, which our predecessors had hitherto kept uncontaminated; reflecting that, from the commencement of the *raj* to the time present, such domestic disputes have never happened; that life is but a few days, and that enmity between relations is esteemed by men of elevated mind the worst of evils; We, and Bhya Jha, the said adopted son (who is a person having right, and not a stranger), calling to mind the name of *Bhugwan*, (than which there is nothing more precious, either in this world or in the next,) have mutually pledged our faith and troth, and by firm agreement and solemn oaths, entering into peace and concord, declaring and swearing, we have agreed to and become satisfied with equal shares of the whole of the property, moveable and immoveable, composing the estate left by the late Ranee; and consisting of cash, goods, pergunnahs, both of the former zemindary, and the zemindary recently acquired by private and public purchases; revenue and rent free villages, *nankar* lands, outstanding debts, mercantile concerns, &c.; that is to say, the said Bhya Jha shall hold the right and property of one-half of the said zemindary, &c. and we the other half. Whatever profits shall be forthcoming from the *malgoozaree*, after discharging the revenue of Government, we will at the end of the year, account for to each other; that is to say, the profits of eight *anas*, or one-half of the zemindary, shall be our right; and the profits of the other half Bhya Jha's, and we shall have no claim thereto. If, which God forbid, the public revenue should fail, both parties, to wit, we, the three

persons aforesaid and Bhya Jha, will personally make good the loss; and after our own names and Bhya Jha's shall be made current in the zemindary, and we shall have obtained a *purdannah* and *sunnud* from the ruler for the time being; and shall have secured the revenue for 1211 *Moolkee*; if such be the will of both parties, we, the said three persons and Bhya Jha, making a partition between ourselves, will take the eight anas of the zemindary, and half of the property, moveable and immoveable; and Bhya Jha the remaining eight anas of the zemindary, with half of the property moveable and immoveable, that being his share. Designing therefore to enter into firm engagements, we have, of our own free will and consent, and on our faith and troth, granted this writing as an agreement (*ahud-nameh*), and declaration (*ikhar-nameh*), the intent of which is to establish firm concord between the parties: to terminate our differences, and to perpetuate the illustrious name of the deceased Ranee, so that it may be a valid document for the future, and prevent any fraud or deceit on either side; and that, as we have no longer any claims against Bhya Jha, should we prefer any claim of right, or inheritance, it may be deemed unworthy of being entertained, or heard, with a view to proof. And should we violate this agreement, or, in any other way, either of ourselves, or at the suggestions of others, attempt, on any ground or pretext, to establish any fraudulent objections against it, we shall be deemed illegitimate outcasts of our race, and merit eternal punishment. We have accordingly granted this written declaration as a valid document of partition (*dustaveez hissanameh*) to serve when required, dated 27th *Aughun* 1211, *Moolkee*, corresponding with the 11th of December 1803. A counterpart engagement was also filed, of the same date and tenor, from Bhya Jha to Sreenarain, Lullutnarain and Ramnarain. It appeared in evidence, that, on the 29th of December 1803, the defendants had attended, along with Bhya Jha, before the Zillah Judge, and declared their willingness to abide by the above agreement. The parties were severally put in possession accordingly, and it was not until the 20th of July 1809, that they withdrew their consent; and setting up the plea of fraud and intimidation on the part of the plaintiff, they obtained an order from the Judge, giving them sole possession of the contested property. On the part of the plaintiff, several witnesses were adduced to prove the fact of his adoption. The Provincial Court, however, considering the deed of compromise, executed and acknowledged as above, to preclude the necessity of any further investigation into the rights of the parties, did not call on the defendants for any answer to the plea of the plaintiff's adoption; and passed a decree, under date the 28th of July 1809, adjudging to the plaintiff a moiety of the estate claimed by him, and of the profits thereof, during the possession of the defendants. Against this decision Sreenarain and Lullutnarain appealed to the Sudder Dewanny Adawlut, stating the following as the grounds of their appeal: 1st, That the respondent was never adopted by the Ranee, as alleged by him. 2dly, That the Ranee was not authorized by the Hindoo law to give away the estate which devolved to her from her husband, Raja Indernarain, to the prejudice of his legal heirs. 3dly, That

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1812. the *soolunamah*, or deed of compromise, on which the decision of the Provincial Court was founded, had been obtained by fraud and intimidation: the appellants being at the time of executing it ignorant of their legal rights; and that it was therefore invalid, and ought not to be enforced. 4thly, That the respondent having (under the option left to him of suing either as adopted son, or under the deed of compromise), originally brought his action for the whole estate in virtue of his alleged adoption: the Provincial Court were irregular in passing judgment in his favour for half the estate, under the deed of agreement; and that their proceedings were further defective, from their having omitted to take any proof of the plaintiff's adoption, or to investigate the objections of the appellant to the deed of compromise, on which their decree is founded. The respondent, in his answer to the pleas of appeal, asserted the validity of the deed of compromise, and desired a confirmation of the decree of the Provincial Court; stating, that he reserved to himself the power of preferring another suit, if he should hereafter judge fit to claim the residue of the estate as adopted son. The case having come to a hearing before the Sudder Dewanny Adawlut, on the 12th of September 1810; the Second and Fourth Judges (Harington and Stuart) being present, the former was of opinion, that an examination of the witnesses adduced by the respondent to prove his adoption, as well as the testimony of such witnesses as the appellants might cite to disprove that fact, and to establish the fraud and intimidation under which they alleged the deed of compromise had been entered into by them, was necessary, to enable the Court to determine upon the double claim of the respondent: first, as adopted son; and secondly, on the compromise set forth in the supplementary petition above recited. The Fourth Judge, though he did not consider it necessary (the respondent having virtually rested his claim on the deed of compromise) to hear the witnesses to the adoption, yet, under the above opinion of the Second Judge, he concurred in ordering that their depositions should be taken; thinking it probable, that, from the magnitude of the cause, it might hereafter be appealed to England, where the evidence to the adoption might be supposed necessary to the final decision; in which event, the omission to take that evidence in the first instance would be productive of serious delay and inconvenience. The Court, at the same time, with the view of ascertaining the Hindoo law applicable to the case, referred the proceedings, with the following questions, to the pundits of the Court: 1st, If (as alleged by the respondent) Ranee Inderawuttee, widow of Rajah Indernarain, some years after the death of her husband, and some hours previous to her own death, regularly adopted the respondent, will the respondent, as adopted son, be entitled to take any lands or other property left by the Rajah Indernarain; and the property, which, after his death, may, during the Ranee's life-time, have accrued from that estate; or will he be entitled only to take the *stridhuan* of the Ranee? 2d, If the Ranee, with or without authority from Rajah Indernarain, made the respondent adopted son to herself and to her husband, according to the *shasters* current in Mithila, would the lands and other property left by the Rajah, and the

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property which has since accrued from the Rajah's estate, go to the respondent! The following answers were returned by the pundits —

1st, If a man appoint another his adopted son, that person, so adopted, stands in the relation to him of a son, and offers up his funeral oblations, and is heir to his estate; but the person, so appointed, does not become the adopted son of the adopter's wife, nor does he offer funeral oblations to her, nor succeed to her property. If a woman appoint an adopted son, he stands in the relation to her of a son, offers to her funeral oblations, and is heir to her estate; but he does not become the adopted son of her husband, nor offer to him funeral oblations, nor succeed to his property. If a husband and wife jointly appoint an adopted son, he stands in the relation of son to both, and is heir to the estate of both. If the husband appoint one person, and the wife another, adopted son, they stand in the relation of sons to each of them respectively, and do not perform the ceremony of offering funeral oblations, nor succeed to the estate of the husband and wife jointly: such is the usage of Mithila. If, therefore, Raneé Inderawuttee, several years after the death of Rajah Indernaran, and some hours before her own death, adopted Bhya Jha, then the respondent stands in the relation of son to the Raneé, and offers up her funeral oblations; but he is not the adopted son or presenter of funeral oblations to the Rajah: therefore the respondent would be entitled to take the Raneé's *stridhun*; but not being a presenter of oblations to the Rajah, he is not entitled to the estate left by him, nor to any property which may have accrued from that estate during the Raneé's lifetime, for this property is distinct from the *stridhun*, or peculiar property of a woman, specified in the *shaster*, and is included in the estate of the Rajah. 2d, If Raneé Inderawutty, with or without the permission of her husband, made Bhya Jha adopted son, on the part of herself and of her husband, still the respondent is not the adopted son of Rajah Indernaran. It is not stated in any law tract, nor is it according to the usage of Mithila, that a person adopted by a wife, with or without the permission of her husband, becomes the adopted son of her husband. The respondent not being the presenter of oblations to the Rajah, nor one of his heirs, he cannot take the lands or other property left by him, nor property which may have accrued from the estate of the Rajah; such property being distinct from the *stridhun* of the Raneé, and forming part of the Rajah's estate. On a further reference to the pundits of the Court, with the view of ascertaining how far the respondent, being the son of the full brother of the Raneé's mother, might be entitled (though not adopted) to claim the succession to her estate in right of inheritance, the following *vyavastha* was delivered: "Supposing that the Raneé did not appoint Bhya Jha her adopted son, he would not inherit her *stridhun*; the son of the mother's brother not being one of the legal heirs to her peculiar property. If the Raneé left a brother, sister, sister's son, husband's sister's son, husband's brother's son, brother's son or son-in-law, any such person is entitled to succeed to the *stridhun*. If she left none of these, Sreenarain and Lullutnarain, the nearest *sapindas* of her husband, are entitled to her peculiar property, as well as to the Rajah's estate." A fur-

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ted by the
wife does
not thereby
become the
adopted son
of the hus-
band, and
vice versa.Nor accord-
ing to the
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thila, even
though the
adoption
should have
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mitted by
the hus-
band.The son of
a maternal
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woman is
not a legal
heir to her
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1812. Sreenarain Rai and Widow of Lallotnairai Rai, v Bhya Jha. According to the construction received in Mithila, the term sister includes also the half sister.

ther reference was made to the pundits of the Court, for the purpose of ascertaining whether (in the event of the adoption of Bhya Jha not being established), Manik Jha, the son of the half sister of Ranee Inderawuttee, who had given evidence in favour of the respondent's adoption, would be entitled to succeed to the *stridhun* of the Ranee? to which interrogatory the following reply was delivered: "As the text of *Vrihaspati* (ordaining the succession of the son of a woman's sister to her peculiar estate), does not generally imply the son of a woman's half sister, Manik Jha is not entitled to succeed to the Ranee's *stridhun*, according to the literal construction of the term sister; but the authorities current in Mithila warrant the construction, that the term sister includes also the half sister: and if the usage of Mithila be in unison with that construction, it is fit that Manik Jha should inherit the *stridhun* of the Ranee." The Court having referred to the Hindoo law officers of the Patna Provincial and Tirhoot Zillah Courts, the questions above stated, respecting the effect of an adoption by the Ranee, of Bhya Jha, the answer of the pundits of both Courts coincided with the expositions of the law delivered by the pundits of the Sudder Dewanny Adawlut. The pundits of the Sudder Dewanny Adawlut were subsequently consulted, on the legal competency of Ranee Inderawuttee, to make a donation of the estate, moveable and immoveable, which devolved to her on the death of her husband, of the profits of that estate during her possession, and of any landed property purchased by her out of such profits: and it appeared, from the opinions which they delivered, that the widow was not competent to make a donation of any landed property, without the express consent in writing of her husband's heirs and relations; but that she might make a gift without their consent of moveable property, of every description, excepting slaves; but that in all gifts it is made a condition, that half the husband's property be reserved for the due performance of his periodical obsequies. The appellants requiring a reference on some further points, the following questions were also referred to the law officers of the Court: 1st, Was the Ranee, who is stated to have been competent to make a donation of the moveable property inherited from her husband, and the moveable property arising from the profits of her husband's landed estate (slaves only excepted), equally competent to make a bequest of such property in favour of Bhya Jha, to take effect after her death? 2d, Whether the injunction, to set apart a moiety of the estate of a deceased person, for his monthly and other obsequies, be exclusively applicable to widows in possession of estates, which have devolved to them from their husbands; or whether it be equally applicable to all persons succeeding by inheritance to the estate of a deceased person; and whether a gift or bequest made, without setting apart as directed, a moiety of the estate, be invalid, according to the *shasters* of Mithila? 3dly, Supposing the Ranee to have constituted Bhya Jha her adopted son, and *malik* of her estate; as stated in the deed of compromise, whether Bhya Jha would have been legally entitled, independently of that deed, to succeed to any and what part of the estate in the Ranee's possession, at the time of her death, besides her *stridhun*? 4thly, Supposing Bhya Jha,

though constituted the Ranee's adopted son, and *malik* of her property, not legally entitled to any part of the property in the Ranee's possession, at the time of her death, besides the *stridhun*, whether there be any texts in the Mithila law tracts, authorising the appellants to resist the enforcement of the deed of compromise, voluntarily executed by them, on the plea of ignorance on this point, when the deed was executed? 5thly, Whether the appellants can object against the enforcement of the deed, voluntarily executed by them, on the plea, that since the time of executing it, they have ascertained, that the Ranee's *stridhun* amounts to an inconsiderable part of the estate? 6thly, Whether there be any authority for annulling the conditions of the deed, on the grounds stated by the appellants, that, at the time of its execution, the property therein referred to was not in the possession of either party, but under attachment by the Zillah Court, till it could be ascertained who were the legal heirs; that there were other claimants to the estate, and that, owing to the objections of the appellants, the respondent had not obtained possession of the estate by virtue of the deed? To the above questions, the pundits answered, 1st, the bequest of the Ranee would be valid, to convey to Bhya Jha all the moveable property possessed by her, and all her *stridhun*; but not the immoveable property, except what might be her's peculiarly. For the Ranee was not authorized to transfer such immoveable property by gift; and although there is no text, in which the case of a bequest is expressly meritorious, yet the same rule applies to bequests, as to gifts; every person, who has authority, while in health, to transfer property to another, possesses the same authority of bequeathing it. 2dly, The text ordaining the setting apart a moiety of the estate, for the monthly and other obsequies of the deceased person, applies universally to all persons inheriting property; but if any other person, than a widow, executed a gift of such property in opposition to the law, such gift (provided the other rules be observed) will not be void, in consequence of the neglect of the single obligation. 3dly, If the Ranee did, as stated in the deed of compromise, make the respondent her adopted son and *malik* of the zemindaree, and other real and personal property, of which she was in possession; and if the agreement, contained in the deed, was not carried into execution, then, according to the law, as current in Mithila, Bhya Jha would be entitled to take, as heir, the *stridhun* only of the Ranee, for Bhya Jha is not one of the heirs of Rajah Indernarain, but under the bequest or gift of the Ranee, he is entitled to all the personal property, if it were not so considerable as to form more than a moiety of the whole estate. 4thly, and 5thly, If Sreenarain Rai and Lullutnarain Rai, the heirs of Rajah Indernarain Rai, without fraud on the part of Bhya Jha, with their own free will, signed the deed of compromise, they are not at liberty, under the Mithila law, to avoid the conditions of the deed, (by which half of the property was agreed to be given up to Bhya Jha) on the plea that they were ignorant at the time of executing the deed; that, besides the *stridhun*, Bhya Jha was not entitled to any of the property possessed by the Ranee, and that they have since the execution of the deed of compromise ascertained, that

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Sreenarain Rai and Widow of Lullutnarain Rai, v. Bhya Jha.

The validity of a bequest upheld.

A widow cannot, except under special circumstances, alienate more than a moiety of her deceased husband's property.

The adopted son of a widow succeeds to her peculiar property, but not to that of her husband.

1812. the *stridhun* property left by the Ranees bears a very small proportion to half of the entire property possessed by her at her death ; for there is no text authorizing the setting aside a deed of this nature, on a plea of ignorance. 6thly, Although at the time the deed of

A deed cannot be set aside, on the plea of ignorance, by the contracting party.

To give validity to an agreement, possession of the subject of it is not necessary.

A widow cannot make a gift of any part of her husband's immoveable property without the express consent of the heir, except under special circumstances.

A plaintiff is at liberty to amend his original claim before it has been investigated.

compromise in question was executed, the property, real and personal, which devolved to the Ranees, from Rajah Indernarin, was under attachment by the Court, on account of the rightful heirs not having been ascertained ; and although, in consequence of the objections of the appellants, Bhya Jha had been kept out of possession, yet under the law of Mithila, the aforesaid deed will not be void ; for there is no text by which possession of the subject of an agreement is declared necessary to its validity. The respondent having referred to an opinion of *Juggunatha*, (the compiler of the Digest of Hindoo law,) in which it is declared, that the gift by a widow, of the immoveable property left by her husband, though immoral and blameable, is not invalid ; the pundits of the Sudder Dewanny Adawlut were called on to state, whether this opinion was supported by any and what books of the Mithila, Bengal, or Benares school. From the answer of the pundits, as well as from a variety of *vyuvusthas*, in other cases, it appeared that the gift of her husband's immoveable property by a widow, without consent of heirs, or unless for special reasons set forth in the *shasters*, was not only blameable, but invalid. The uniform decision of the Court, in other cases, had likewise disallowed such power of transfer by the widow. Several witnesses were examined by the Provincial and Zillah Courts under the orders of the Courts of Sudder Dewanny Adawlut, with respect to the fact of the adoption by the Ranees of Bhya Jha, and also as to the alleged fraud and intimidation stated to have been used by a person named Bhya Ram Mitter, acting on the part of Bhya Jha. With respect to the adoption, a great many witnesses swore in direct opposition to each other ; those of the respondent, to the fact of the Ranees having constituted Bhya Jha her adopted son, and made over to him her property real and personal ; and those of the appellants, on the other hand, that no such transaction had taken place. With respect to the intimidation stated by the appellants to have been made use of, to compel them to execute the deed of compromise, there was not sufficient evidence to support that allegation ; the utmost which the testimony of their witnesses appeared to establish was, that Bhya Ram had urged to them the danger of allowing the estate to get into the hands of the collector, from the evils of a protracted litigation, and his power of conducting it to their ruin. The following were the grounds on which the decision of the Sudder Dewanny Adawlut, on this case, was founded : It appeared to the Court, that although Bhya Jha had originally instituted the present suit, for the recovery of the whole estate vacated by the death of the Ranees, in right of adoption and gift, which claim, if persisted in, would of course have superseded his claim under the deed of compromise, yet that having, in a supplementary plaint, as allowed by the regulations, amended his original claim, before it had been investigated and determined on in any Court ; which supplementary claim, though somewhat irregularly brought

forward, must have been intended (if admitted,) to supersede the previous claim to the entire estate; having, all along, professed his willingness to abide by the agreement; having objected in this Court to the examination of witnesses in support of his title to the whole estate, and desired a confirmation of the judgment of the Provincial Court, he was entitled to avail himself of the deed of compromise, the validity of which appeared to the Court to be the sole question for decision, and the evidence brought forward to prove, that it had been executed under circumstances of fraud or intimidation seemed wholly insufficient to support that plea, or afford any ground for setting aside a deed, which had been solemnly acknowledged by the parties as above stated. The evidence taken respecting the adoption, the Court were of opinion, rendered it extremely doubtful, whether that transaction had taken place or not; and could not consequently be received as a proof of fraud on the part of the respondent, in alleging his title to the Ranees' estate as her adopted son; while the desire of avoiding litigation on this point appeared to afford a rational and sufficient motive for the execution of the deed by the appellants. The testimony of Mr. Laing, the collector, who had been examined in an investigation connected with the present cause of action, rendered it probable, that the appellants were strongly inclined, without any influence from Bhyaram Mitter, to enter into an amicable agreement with Bhya Jha; and the Court did not see reason to believe, that the representation made (as stated in the evidence of the appellants own witnesses) by Bhyaram, to induce the appellants to execute the deed of compromise was *malâ fide*, or such as to invalidate the agreement; even supposing it had been entered into, in consequence thereof. With regard to the appellants plea, that they had executed the deed in question under a misapprehension of their own and the respondent's rights, the Court observed, that after all the enquiry which had taken place, the rights of the parties, as they depended on the facts, remained so doubtful, as still to afford a fair and equitable basis for a compromise: that, under the opinions of the pundits, the respondent, if adopted by the Ranees, would take by inheritance all her peculiar property, real and personal, the extent of which was extremely uncertain, and might possibly include the whole of the landed estate: and that, under the donation of the Ranees (if established), as alleged by Bhya Jha, and sworn to by his witnesses, Bhya Jha would be entitled to the whole of the personal property left by the Ranees, provided it did not amount to more than a moiety of the whole estate; under these circumstances, there appeared to the Court to have been the most reasonable grounds for the parties coming to an accommodation; and that, consequently, the deed executed and acknowledged by them with the view of terminating their difference, ought to be upheld. The Court accordingly (present J. H. Harrington and J. Stuart), affirmed the decision of the Provincial Court. Costs of suit were made payable by the parties respectively.

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1812. MOHUN LAL KHAN (Brother and Representative of ANUND LAL), Appellant,

Aug. 31st.

versus

RANEE SIROOMUNNEE, Respondent.

A Hindoo widow cannot, under any circumstances, alienate the whole land-estate devolved on her by the death of her husband, nor can she alienate a part (except under special circumstances,) without the consent of all the husband's heirs, notwithstanding she may have obtained the consent of the nearest heirs; and a deed of gift executed by her in favour of a stranger, to be valid, must be attested by all her husband's heirs, as consenting parties.

THIS was an action brought by the respondent, Ranees Siroomunnee, on the 24th of September 1806, in the Zillah Court of Midnapore, to recover from Anund Lal the zemindary of pergunnahs Midnapore, &c.; the public revenue assessable on which amounted to sicca rupees 85,000. Before the cause came to a hearing in the Zillah Court, it was transferred, under the provisions of regulation 13, 1808, to the Provincial Court. It was set forth in the plaint, that in the year 1207, the defendant, who was then the plaintiff's servant, and employed in the management of her zemindary, had imposed upon her a *hibbanameh*, or deed of gift, as a *mookhtar-nameh*, or power of attorney, which she had intended to execute, in order to authorize the defendant to act for her in adjusting the public assessment for her lands, and executing the usual engagements on her part for the revenue; that, under this *hibbanameh*, thus fraudulently obtained, the defendant had caused the plaintiff's zemindaree to be entered on the public records in his own name; had entered into engagements for the public revenue, and received possession from the collector: for the recovery of which she now sued. The defendant stated in answer, that the Ranees (plaintiff) had executed the *hibbanameh* in question with a full knowledge of its contents; and had repeatedly acknowledged it to the collector, who had, in consequence, put the defendant in possession; and that she was now induced by the arts of those about her to set up this claim. The *hibbanameh*, abovementioned, was written in the Persian language and character, but bore the signature of the Ranees in the Bengalee character, with the addition (also in the Bengalee language and character) of these words, "*this hibbanameh is valid.*" It purported to make over to the defendant her zemindaree and household property, without any reservation or provision for her own support. It bore date the 19th Assar 1207 (30th of June 1800), and had been registered in the Zillah Court on the 31st of July following. The zemindaree in dispute had devolved to the Ranees on the death of her husband, Ajeet Sing, which occurred in the *Umlee* year 1162. A. D. 1756. In the year 1800, when the above deed had been executed, the landed property of the Ranees was under the superintendence of the Court of Wards, as the estate of a disqualified zemindar. The pundit of the Provincial Court, in answer to a reference made to him by the Senior Judge, delivered a *vyavastha*, declaring, "that, if Ranees Siroomunnee had made a gift of the estate, which devolved to her on the death of her husband, without the consent of the surviving heirs of her husband, such gift was invalid." Subsequent to the delivery of this *vyavastha*, the respondent, Anund Lal, filed a *ladavee*, or deed of relinquishment, bearing the signatures of Bulbudder Bhooyan, Radhagovind Bhooyan and Koochil, maternal first cousins of the deceased Rajah. This

deed purported, that the subscribing parties had, at the time of the execution of the *hibbanameh*, acquiesced in it; that they now did and renounced all claim to the estate. It bore date the 25th *Bhudoon* 1216. No other proof of the consent of the heirs of Ajeet Sing was offered by the respondent. The Senior Judge of the Provincial Court, on the ground that the deed of gift executed by the Ranee (not having been executed with the consent of all the heirs of Ajeet Sing surviving at the time), was void and of no effect, passed a decree, adjudging, that the estate in dispute should be placed under the custody of the Court of Wards for the benefit of the plaintiff, and that the defendant should account for the net proceeds of the estate, from the date of the Ranee's plaint in the Zillah Court. Mohun Lal having succeeded to the rights of his brother Anund Lal, who demised while the suit was pending before the Provincial Court, preferred an appeal from the above decree to the Sudder Dewanny Adawlut. It was admitted by the appellant, that when the *hibbanameh* was executed, there were living five maternal first cousins of the Rajah Ajeet Sing, viz. Somer, Panchoo and Koochil, sons of Saureshore, the elder brother of Rajah Ajeet's mother; and Bulbudder and Radha Govind, sons of Ramkishen, her younger brother: of these, Somer and Panchoo had since died, leaving issue. Four persons now came forward, calling themselves relations and heirs of Rajah Ajeet Sing, viz. Samanund Mohapater and Gujraj Mohapater, who stated themselves to be descended in a direct line from Lukhun Sing, the great grandsire of the great grandfather of Ajeet Sing; and Roopchurn Mohapater and Ramchurn Mohapater, who stated themselves to be descended from a brother of Lukhun, and who had, on the 29th of July 1800, presented a petition to the Zillah Judge, praying, that the Ranee Siroomunnee might be prevented from making a donation of her estate to the injury of the legal heirs; which she was then about to do, influenced by the fraud and intimidation of Anund Lal. Of these persons, Roopchurn had brought an action, in support of his claim, in the Zillah Court, which was, at the same time as the present action, under appeal to the Sudder Dewanny Adawlut; and Samanund and Gujraj, along with another named Bindrabun, who claimed the same relationship to Ajeet Sing, had, while the present suit was depending, presented a petition to the Sudder Court, renewing their claim and objections to the *hibbanameh*. The respondent gave in a list of twenty-nine persons, included in the genealogical table exhibited by her, as *sagotra*, or paternal kinsmen of Ajeet Sing, and stated to be then alive. The only evidence adduced by the appellant in support of his claim was the aforesaid exhibit, which purported to be a deed of relinquishment, and to have been signed by three of the relations of the Rajah by the mother's side. One of these persons positively denied all knowledge of the document, and the others pleaded ignorance of its contents and duress. With a view to ascertain the law applicable to the case, and how far further evidence on the points at issue was necessary, the following questions were referred to the Hindoo law officers: 1st, Among the relations of Ajeet Sing, stated to be now living, viz. the sons of his maternal uncles, the

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1812. descendants of Lukhun Sing (the ancestor in the sixth degree of Ajeet Sing), and the descendants of Lukhun Sing's brother, who will be the legal heirs on the death of the widow, supposing them to survive her? 2d, Supposing the respondent to have knowingly and voluntarily executed the deed of gift, dated the 19th *Assar* 1207, to Anund Lal Khan, and the deed of relinquishment exhibited by the appellant to have been also given voluntarily; are these sufficient to render the deed of gift valid under the provisions of the Hindoo law, which requires the consent of the husband's kindred to a gift or other alienation of the husband's estate devolving on his widow? 3d, If the deed of gift could, under any consent of the heirs or kindred, be valid for the transfer of the entire landed estate in possession of the Ranee, whose consent is required for that purpose? and is it necessary that the heirs should have attested the deed of gift? The following were the answers delivered to the above queries: 1st, On the death of the widow, the survivors being the sons of the Rajah's mother's brother, the descendants of Lukhun Sing (the great-grandsire of the great-grandfather of Rajah Ajeet Sing), and the descendants of Lukhun Singh's brother: the sons of his mother's brother will be legal heirs, in default of nearer kinsmen, and if the deed of gift executed by the Ranee be invalid, they will be entitled to succeed to the zemindaree left by Ajeet Sing. 2nd, Although the respondent, with full information and free will, may have signed the deed of gift, dated the 19th *Assar* 1207 *Umlee*, and in pursuance of that deed, Anund Lal, the donee, may have obtained possession of the property given; and although the sons of the maternal uncles of Rajah Ajeet Sing (who, after the Ranee's death, will be entitled to succeed to the estate of her husband), may have voluntarily executed the deed of relinquishment exhibited by the appellant, still the donation specified in the deed of gift is contrary to law, and is not valid; because the consent of two of the Rajah's maternal uncle's sons does not appear to have been obtained; because the deed of gift does not bear the attestation of those heirs who are alleged to have subscribed the deeds of relinquishment; because a moiety is not reserved for the obseques of the deceased proprietor, as the law requires; because a gift of the whole landed estate and household effects is contrary to legal usage, which authorizes only suitable gifts in proportion to the wealth of the party; and because the deed of gift does not contain the permission of the Rajah's paternal kindred who were then and are still living. They who have voluntarily signed the deed of relinquishment, cannot legally claim in opposition thereto; but they who have been compelled are not bound by it. 3d, As the gift specified in the *hubbanameh* for the whole landed estate and household effects is not legal, the assent of the heirs of Rajah Ajeet Sing thereto is of no avail. But had the gift been otherwise valid, the deed conveying it should have been attested by the heirs and paternal kindred, to prevent any doubt with respect to the fact of their consent having been actually obtained. In an opinion delivered by the pundits in the cause *Roopchurn Mohapatra v. Anund Lal Khan* abovementioned, it was expressly stated, that if the Ranee's gift to the latter was not sanctioned by her husband's

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family, it is *utterly null and void*: that what has been so given must be considered as not given, and that the restoration of property held under a void gift should be enforced by the ruling power. The Court were satisfied from the opinion of their law officers in this and several other cases; from the authorities quoted by them, and the rules laid down in the *Dayabhaga*, (a work of the first authority in the Bengal system of law,) that the consent of the husband's paternal kindred, as being the legal guardians and advisers of the widow (though not in all cases the nearest heirs,) is necessary, (except under certain special circumstances,) to the validity of an alienation by the widow (even with the consent of the husband's maternal kindred,) of any part of the estate devolving to her, on her husband's death. But it appeared in this case, that the deed of gift executed by the respondent in favour of the appellant had been not only without the consent of her husband's paternal kindred, but in opposition to their remonstrances; that there was no sufficient motive for any gift such as the Hindoo law requires in such cases, and that, therefore, the deed under which the appellant claimed to hold the zemindaree, was void *ab initio*. The Court (present J. H. Harington and J. Fombelle), under these circumstances, without taking evidence respecting the authenticity of the deed of relinquishment exhibited, passed a decree, affirming the decision of the Provincial Court, and dismissing the appeal with costs.

ROOPCHURN MOHAPATER, Appellant,

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versus

ANUNDLAL KHAN, Respondent.

Sept. 1st.

THIS was an action brought by the appellant, Roopchurn Mohapater, and another, as paupers, in the Zillah Court of Midnapore, on the 24th of February 1802, to recover possession of the zemindaree of pergunnahs Midnapore, &c. the annual *jumma* of which amounted to sicca rupees 85,000. It was set forth in the plaint, that the estate in question having devolved in the year 1162, to Ranees Siroomunnee, on the death of her husband Rajah Ajeet Sing; she had, in the year 1207, been induced by the fraud of Anundlal Khan, her *naib*, to execute a deed of gift, transferring the entire estate to him; that he had in pursuance of this deed of gift, been put in possession of the said estate by the Collector, to the injury of the plaintiff, who claimed possession as the heir at law of Rajah Ajeet Sing, being lineally descended from the ancestor in the sixth degree of Ajeet Sing. The defendant, Anundlal, stated in answer, that the above deed of gift had been knowingly and voluntarily executed by the Ranees, and that the Collector of the Zillah had put him into possession in pursuance of it, after receiving the Ranees' repeated acknowledgments of her acquiescence in it; that the Ranees was now induced by the arts of those about her, to set up the plea stated in her deposition. This deposition corresponded with her statement, as given in the preceding

1812. report, and went to prove, that the deed of gift had been obtained by fraudulent means. The Zillah Judge, in a decree, reciting, that, from the evidence on the case, it appeared, that the *hubba-namoh* in question had been executed, as stated by the defendant Anundlal; that the plea of the Ranee was groundless; and that, under the Hindoo law, as set forth in the digest translated by Mr. Colebrooke, such gifts were declared not invalid; dismissed the claim, with costs. On appeal to the Provincial Court, that Court affirmed the decree of the Zillah Judge, on the ground that the plaintiff had clearly no right of inheritance to the *zemindaree* while the Ranee lived, but left him at liberty to bring a fresh action for any rights he might consider himself to have on the death of the Ranee. A further appeal was preferred by Roopchurn Mohapater to the Sudder Dewanny Adawlut. On reference, to ascertain the law according to the authorities current in Orissa, as applicable to the case, the following *vyavastha* was delivered by the Hindoo law officers:—"If there be no *sapindas* of the Rajah Ajeet Sing (the Ranee's husband,) within three degrees, the *saculyas*, or remoter relations from three to ten degrees, may succeed to the property on the death of the Ranee. If any such survive, the Ranee has no power to give away the estate without their consent. If the Ranee have made a gift without their consent, it is invalid; such gift is utterly null and void, and will not avail any thing in opposition to the claim of heirs. If there be no nearer heirs, the appellant, provided he can establish the relationship alleged by him, will be entitled to the inheritance." By a former *vyavastha* detailed in the report of the cause, Anundlal Khan v. Ranee Siroomunnee, it appeared that, according to the Bengal code, (which was allowed to be observed in the family, and to regulate all religious ceremonies, which, with those of marriage, were performed by Bengal *purohits*,) the sons of the Rajah's maternal uncles would succeed to his estate on the demise of the Ranee, provided the gift made by her was set aside as invalid. Under the above circumstances, the Court (having the preceding day, in the cause abovementioned, adjudged that the estate in dispute should be placed under the custody of the Court of Wards, for the benefit of the Ranee Siroomunnee,) passed a final decree, (present J. H. Harrington and J. Fombelle) amending the decisions of the Zillah and Provincial Courts, as far as they went to uphold the respondent's title to the estate, and dismissing the appeal; leaving it to the appellant, in the event of his having any claim to the estate after the decease of the Ranee, to bring a fresh action for the recovery thereof.

Roopchurn
Mohapater,
v. Anundlal
Khan.

NAWAB MOOHUMMUD KERAMUT OOLLAH KHAN,

1812.

Appellant,

versus

Sept. 8th.

DESRAJ, Respondent.

THIS was an action brought by Desraj in the Zillah Court of Claim of Bareilly, on the 2d of April 1806, for the recovery of mouza Daga ^{respondent} Rugha and other 14 mouzas, situate in the pergunnah of Nekoha, ^{to a zemin-} daree in the ^{daree in the} the *jumma* of which was specified at 1,949 rupees. It was set ^{district of} forth in the plaint, that at the time of the settlement of the public Bareilly revenue for the territory ceded by the Nawab Vizier, by the ^{admitted} Lieutenant Governor in the year 1802, the defendant's father, ^{on proof of} Iradut Khan, taking advantage of the ignorance of the plaintiff, ^{right; but} he not had fraudulently got his name inserted as zemindar of the above ^{having pre-} villages, which were the ancient hereditary tenure of the plaintiff; ^{ferred his} had entered into engagements for the public revenue, and obtained ^{claim a-} possession; for the recovery of which the plaintiff now sued. The ^{gainst the} defendant denied that the plaintiff had any proprietary right to ^{present} the villages in question; alleging that they were included in a ^{possessor} zemindaree composed of 96 villages, which the defendant's father, ^{within} Iradut Ali Khan, had, in the year 1209 *Fuslee*, purchased from ^{three years,} Yar Moohummud Khan, and other heirs of Baz Khan and Juvan ^{being the} Khan, who had, for many generations, held it in full proprietary ^{period for} right, and to whom Iradut Ali had, from the year 1203, acted as ^{which the} agent in the management of their estate; that the name of Iradut ^{first en-} Ali had accordingly been entered as zemindar in the papers rela- ^{agement} ting to the triennial settlement, for the years 1210, 1211 and 1212; ^{was entered} and that the plaintiff, who had farmed the disputed villages under ^{into, he} him, having fallen into arrears, he had ousted him of his farm; ^{was de-} and that he had therefore wrongfully set up the present claim. ^{clared (in} The defendant filed in Court two vouchers; the one a *pottah*, ^{conformity} granted by the Collector on the 8th of March 1803, by which the ^{with the} *jumma* of the pergunnah Nekoha was settled with the defendant ^{provisions} 1803,) ^{contained} as zemindar, at 88,174 rupees; the other was the *bundobust*, or ^{in clause} document in which the different mouzas of the pergunnah, and all ^{3, sec. 53,} the details relating thereto, were entered. In this the defendant's ^{reg. 27,} name was entered as zemindar of 130 villages, some of which he ^{not entitled} was stated to have held at a fixed rent (*istimraree*) since the year ^{to regain} 1203, others from the year 1205, and others from 1209 *Fuslee*. ^{possession} It was likewise therein stated, that owing to the disturbances of ^{until the} the country, all the ancient records had been lost; so that no ac- ^{expiration} curate information respecting the landholders could be obtained. ^{of ten} Neither party had any document, by which the fact of hereditary ^{years, from} right could be established. The testimony of one *canoongo* went ^{the date of} to prove, that the contested lands were well known to be included ^{the first} in the zemindaree of Yar Moohummud Khan, and the other Khan- ^{lease.} zadahs; that in the year 1209, the defendant brought to the witness a bill of sale for the lands, executed by those Khanzadahs, and requested him to sign it, which he accordingly did; that the defendant, from the year 1203, in which he had been appointed agent by them, had received all the dues of a zemindar. Three other *canoongoes* deposed, that, from the year 1185 to 1210, during

1812.

Nawab
Mohum-
mud Kera-
mat Oollah
Khan, v.
Desraj.

which time they had acted in that capacity, the plaintiff's father had been zemindar of the villages in question; and that they knew from their ancestor's report, that the plaintiff's family had held the lands for many generations; that they had always received a certain description of *cesses*, to which zemindars alone were entitled. The Zillah Judge, not considering the proof sufficient to establish the proprietary right of the plaintiff in the disputed lands, dismissed the suit. On appeal by Desraj to the Provincial Court, that Court, on the grounds that it had been established by evidence that the appellant's family had, for many generations, received the dues of a zemindar, and that there was no proof of any right to the lands in question having been vested in Yar Moohummud and the other Khanzadahs, from whom the defendant derived his title; reversed the decree of the Zillah Court, adjudging possession of the disputed villages to the appellant. An appeal having been admitted by the Sudder Dewanny Adawlut, further evidence was called for with respect to the rights of the respondent, and of the persons from whom the appellant derived his title. Further evidence was taken accordingly, and the result clearly proved, that the respondent's family had, for many generations, held the lands in question in proprietary right. The evidence in support of the right of the Khanzadahs, to whom the appellant had succeeded by purchase, being wholly unsatisfactory, the Court of Sudder Dewanny Adawlut passed a final decree (present J. Fombelle and J. Stuart), affirming the decree of the Provincial Court, as far as it went to adjudge to the respondent the proprietary right to the lands in dispute; but amending that part which directed that he should be put in possession of the lands, at the conclusion of the settlement then existing. It being provided in clause 3, section 53, regulation 27, 1803, that persons holding claims to lands, (for which engagements have been entered into by the present possessors,) who may not prefer their claims before the expiration of the first lease of three years, should not be entitled to regain possession, until the expiration of ten years, (the period fixed for the three temporary settlements,) and the respondent not having preferred his claim within the prescribed period, the Court directed that he should be put in possession of the lands in question at the commencement of the *Fuslee* year 1220, when the decennial term should have expired. It was likewise provided in the decree, that nothing therein contained should affect the rights of any persons claiming a joint property with the present respondent in the lands in question. Costs of suit were made payable by the appellant.

LUKKUN MANIK RAI, Appellant, ,
versus
 MUSSUMMAUT ROOKNEE, Respondent.

1812.

Sept. 10th.

THIS was an appeal by Lukkun Manik, against an order passed by the Second Judge of the Provincial Court of Dacca, rejecting the appellant's petition of appeal from a decree passed after a summary investigation, under the provisions of regulation 49, 1793, by the Zillah Judge of Bakergunge, by which possession of certain lands were adjudged to the respondent. It appearing that the appellant had, in his petition to the Provincial Court, stated, as his ground of appeal, the irrelevancy of the regulation abovementioned to the case, and the Second Judge of the Provincial Court having assigned no reason for the rejection of the petition of appeal, a precept was directed to that Court, calling on them to transmit an explanation of the grounds of the order of the Second Judge. In answer to the above precept, the Provincial Court transmitted a *roobukaree*, reciting, that it appeared from the decree of the Zillah Judge that the lands in dispute had been the estate of Kasheenath Rai, the deceased husband of the respondent; that disputes existed between the parties concerning the possession, which had called for the interference of the criminal Courts; that in a summary enquiry, the Zillah Judge had ascertained the previous possession of the respondent, and finding that the appellant had dispossessed her by fraud and violence, had passed a decree, adjudging possession to the respondent; that, on these grounds, the case had appeared to the Provincial Court clearly to come under the above regulation, and that the investigation of the proprietary rights of the appellant, as adopted son, could be cognizable only by a regular action under regulation 4, 1793. It appearing to the Court of Sudder Dewanny Adawlut, that, as the appellant's petition of appeal to the Provincial Court contained an express claim to appeal, on the ground of the irrelevancy of regulation 49, 1793, it was clearly the duty of the Provincial Court to admit an appeal, and investigate that point, under the provisions of section 7, regulation 5, 1793. The Court accordingly (present J. Fombelle and J. Stuart) passed an order, directing the Provincial Court to receive the appeal, and proceed to investigate the question of the relevancy or irrelevancy of regulation 49, 1793, to the present suit.

A decree having been given against the appellant in the Zillah Court, by a summary decision, passed under the provisions of regulation 49, 1793; the appellant petitioned the Provincial Court to admit an appeal from that decision, on the ground that the regulation abovementioned was not relevant to his case. The petition rejected, but the Court of Sudder Dewanny Adawlut held that an appeal should be admitted for the purpose of investigating the appellant's objections.

1812.

Sept. 23d.

• OODWUNT RAWUT, Appellant,
versus
 AULUK RAI, Respondent.

Where notice has not been served on an appellant, as required by section 12, regulation 5, 1793, delay on his part in filing his pleas of appeal is not a sufficient ground for dismissing his suit.

THIS was an appeal brought by Oodwunt Rawut, from a dismissal of appeal by the Provincial Court of Patna, on default. It appeared, that the appellant had, on the 17th of August 1809, been admitted to appeal, as a pauper, in the Provincial Court of Patna, against a decision passed by the Zillah Court of Shahabad; and a summons was accordingly, on that date, issued in the name of the respondent; that, on the 28th of August 1810, the *vukalutnamch*, on the part of the respondent, was filed in Court; that, on the 27th of November following, on a petition of the appellant's *vakeel*, the Collector's agent was required to furnish the stamp paper necessary for the appellant's pleas of appeal: that the pleas of appeal were not filed till the 11th of March 1811; that, on the 29th of that month, the cause was brought on before the Senior Judge of the Provincial Court, when the appellant's *vakeel* being asked by the Court, why he had not sooner filed the pleadings on behalf of his client? replied, that he had not received his instructions until the 27th of November 1810, on which date, after amending the rough draft, and procuring it to be written on stamp paper, he returned it to the appellant, for his final approbation. That the document not having been returned to him until the 22d of February 1811, he had been unable to present it sooner in Court. The Senior Judge of the Provincial Court, not considering the reasons of delay assigned by the appellant's *vakeel*, to be good or satisfactory, dismissed the appeal, and affirmed the decree of the Zillah Judge. An appeal from the above order being preferred to the Sudder Dewanny Adawlut, and it appearing from an answer, to a reference made to the Provincial Court, that the appellant's *vakeel* had not been required to present the pleas of appeal within any specific time, and that no notice had been served on the appellant, as required by section 12, regulation 5, 1793, the Court did not consider the delay as a sufficient reason for dismissing his suit. The Court accordingly (present J. Fombelle and J. Stuart) annulled the order passed by the Senior Judge of the Provincial Court, on the 29th of March 1811, and directed that the appellant's appeal should be again received and proceeded on.

SHEWUK PAI., Appellant,
versus
 JUGGOOBUNDUA, Respondent.

1812.

Sept. 23d.

THIS was an appeal brought by Shewuk Pal against a dismissal of appeal by the Provincial Court of Patna, on default. It appeared, that the appellant's appeal, from a decision of the Zillah Court of Sarun, preferred in person to the Provincial Court of Patna, had been admitted on the 15th of February 1809; that notice, which was consequently served on the respondent, had been returned, with the respondent's receipt endorsed thereon, on the 21st of March of the same year; that, on the 14th of October 1811, the respondent's *vakeel* having petitioned the Provincial Court, that the appellant might be summoned to attend and proceed in his appeal, or the appeal dismissed; and it appearing that the appellant had not done any act in pursuance of his appeal, up to that date, the Second Judge of the Provincial Court passed a decree, dismissing the appeal, and stating, as the grounds of the decision, the provisions of section 12, regulation 5, 1793, which provides, that "if the appellant, in an appeal, filed in the Provincial Court, shall not proceed in the appeal for six weeks, the appeal is to be dismissed, unless the appellant shall shew reasonable cause, to the satisfaction of the Court, for not having proceeded in it." The appellant appealed from the above decree, stating that he had been prevented by various private misfortunes from attending the Provincial Court, and that several causes, lower in the file than his appeal, not having been taken up, the decision was irregular. The Court of Sudder Dewanny Adawlut (present J. Fombelle and J. Stuart) were of opinion, that the intent and meaning of the above provision was, that if an appellant shall neglect, for the term of six weeks, to perform any act required from him in the regular prosecution of the appeal, his appeal is to be dismissed; but that, before the judgment of dismissal be passed against him, he is to be called upon (by the process prescribed for summoning defendants) to shew cause for not having proceeded in the appeal, and that such cause, if it be established and be good and sufficient in itself, is to be admitted, to save the dismissal; and that, in the event of the appellant failing to attend after service of such process, or to shew good and sufficient cause for not having proceeded in the appeal, the Court shall then dismiss the suit. The Court of Sudder Dewanny Adawlut reversed the judgment of dismissal passed by the Provincial Court, and directed that Court to proceed in the mode above detailed.

1812.

RAMKŌOMAR NEAEE BACHESPUTTEE, Appellant, .

versus

Nov. 24th.

KISHENKUNKER TURK BHOOSUN, Respondent.

The gift by a father of the whole ancestral estate to one son to the prejudice of the rest, or even to a stranger, declared a valid act (although an immoral one) according to the doctrine received in Bengl.

But Query?

THIS was an action brought by the appellant Ramkoomar Neaee, on the 13th of July 1803, in the Register's Court, zillah Nuddea, to recover from the respondent a certain garden, situated in mouza Bhatpara, the specified value of which amounted to sicca rupees 250. The parties in this cause were full brothers, of whom Kishenkunker was the elder. The plaintiff claimed the garden in question as forming part of the estate of Ramkonth Soobharn, his father, who, he alleged, had, by a *danputra* or deed of gift, made over to him (the plaintiff) the whole of his property, real and personal, in the Bengal year 1202 (1795), since which time he had been in possession of it, with the exception of the garden in dispute, which the defendant had in the year 1208, unjustly possessed himself of, and for the recovery of which he now sued. The defendant, in answer, admitting that the garden in question had formed part of his father's estate, pleaded that his father had, in the year 1191, made over to him, by a deed of gift, one-half of his property, real and personal, and subsequently, in the year 1201, had executed in his favour a second deed of gift, transferring to him the remainder; and that he had accordingly been in possession of the whole of his father's estate, including the disputed land, since the latter period. The deed of gift alluded to in the plaint, dated the 22d *Assa* 1202, and bearing the signature of Ramkonth Surma, and the attestation of three witnesses, was filed on behalf of the plaintiff. This deed had been registered in the Zillah Court of Nuddea, on the 12th of September 1796. It purported to convey to the plaintiff, in full proprietary right, the whole property, real and personal, of the donor, excepting certain dwelling houses, which were stated to have been granted to his younger daughters, and to the son of his elder daughter, with gifts to other relations. The two deeds of gift mentioned in the defendant's answer were also filed in Court. The first, under date the 13th *Kartick* 1191, B. S. and bearing the signature of Ramkonth Surma, and the attestation of nine witnesses, purported to convey to the defendant certain *burmoter* lands, gardens, houses, &c. and a moiety of all the other property of the donor. The second, under date the 7th of *Aughun* 1201, B. S. (1st of December 1794,) with the same signature, and the attestations of twelve witnesses, purported to transfer to the defendant, all the property of the donor which had not been conveyed by the former deed of gift. The Register issued a *purwannah* to the father of the parties, (who was still alive, and resident at Bhatpara,) stating the grounds of the action, and calling on him to attend in person or by *vakeel*, to declare which of the deeds of gift, produced by the parties, was authentic. In his answer, Ramkonth declared, that he had never made over any part of his property to the defendant, who had always behaved undutifully towards him, and that the deed of gift, produced by the plaintiff, was the only valid and authentic document. Upon this declaration, and the evidence of witnesses proving the possession

of the plaintiff up to the year 1208, the Register passed a decree, under date the 22d of May 1804, adjudging possession of the disputed lands to the plaintiff, with costs against the defendant. On appeal to the Judge by Kishenkunker, farther evidence was taken on both sides in proof of the execution of the deeds of gift. The father of the parties, on being again interrogated, adhered to his former statements, in favour of Ramkoomar; a decree of the Zillah Court of Midnapore, bearing date the 1st of August 1796, was likewise exhibited in this case, from which it appeared, that a suit was instituted against the appellant Kishenkunker, by two persons, named Puddumlochun and Kishenmohun, for the recovery of the value of grain seized by Kishenkunker, on account of the rent of certain lands, the proprietary right in which was claimed by the plaintiffs; on which occasion a petition had been presented by Ramkonth, stating that the defendant had, on account of his undutiful behaviour, been many years before disinherited by him; and that the action then depending before the Court was fraudulent; neither party having any title to the lands in question. It did not appear, that Kishenkunker had, on that occasion, made any mention of his having the deeds of gift now produced. The Zillah Judge, for the reasons detailed in his decree, considering the right of Ramkoomar established, passed a decree, affirming the decision of the Register. An appeal being preferred by Kishenkunker to the Provincial Court of Appeal (previously to which Ramkonth Surma, the father of the parties, had demised); that Court passed a decree, reciting, that the evidence on both sides, to the execution of the respective deeds of gift, was equally entitled to credit; that it appeared, that the father of the parties, from his extreme age, was probably not in full possession of his reason, and had alternately been persuaded by each of his sons, to execute deeds of gift in their favour; that the deeds executed by him, under such circumstances, could not be deemed valid, and were, besides, inadmissible in law; and that, setting aside the deeds of gift, each party was entitled to share equally in the estate of their deceased father. The decrees of the Judge and Register were therefore reversed, and one moiety of the disputed lands was adjudged to each of the parties. Ramkoomar being dissatisfied with this decision, presented a petition, for a special appeal, to the Sudder Dewanny Adawlut. The Court, on consideration of the opposite decisions of the Courts below; there appearing to be no proof of the imbecility of the deceased at the time of executing the deed of gift, and the decision of the question being stated to involve the rights of the parties to an estate amounting to upwards of 40,000 rupees; admitted an appeal. It appeared on going into the case, that there was no foundation whatever for the opinion of the Court of Appeal; nothing being adduced to justify the belief, that the deceased had not been in perfect possession of his senses at the time of executing the deed of gift in 1202, B. S., and the only question which seemed to remain, was whether or no the deceased was justified by law in making such a disposition of his property. With the view of ascertaining the Hindoo law applicable to the case, the Court referred the following question to the poudits: If a person of the

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Ramkoo-
mar Neae
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tee, v.
Kishen-
kunker
Turk Bloo-
sun.

1812. **Rankoornar Neace Bachesputtee, v. Kishen-kunker Turk Bhoo-sun.** Brahmin tribe, during the life time of his eldest son, transfer by gift the whole of his estate, real and personal, ancestrel or acquired, to a younger son, is such a gift valid or not valid, according to the law authorities current in Bengal? The pundits, in their answer, stated, that such a gift was valid, though (the gift of the whole ancestrel landed property being forbidden,) it was immoral. The Court were satisfied (from the evidence in the case to the execution of the deed of gift in favour of the appellant, and his subsequent possession of the estate of his father under it), that the deed of gift in favour of the appellant was regular and valid; and were of opinion, that the evidence in proof of the execution of the deeds of gift in favour of the respondent was altogether unsatisfactory, being contradicted by the declaration of the deceased, and rendered liable to suspicion from the circumstances of the deeds not having been registered, and not having been produced in the former cause in Zillah Midnapore. The Court accordingly (present J. Fombelle and W. E. Rees) under the opinion of the law officers, upheld the appellant's deed of gift, and passed a final decree, reversing the decision of the Provincial Court, and affirming the decrees of the Register and Judge. Costs of suit in the Provincial Court and the Sudder Dewanny Adawlut to be paid by the respondent. (a)
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1813. **GUNGARAM BHADUREE, (Guardian of ISHWURCHUND Roy, a minor,) Appellant,**
versus
KASHEEKAUNT ROY, Respondent.
 Feb. 4th.

On the death of a Hindoo widow in possession of her husband's estate, claim preferred by A, founded on gift and adoption under a written permission of the husband; resisted by B, on alleged title of a previous gift, and denial of the adoption

THIS was an action brought by Gungaram Bhaduree, as guardian, on behalf of his ward, Ishwurchund Roy, for possession of the landed property of Rancee Juggut Ishwuree, widow of Bhyroo Indurnarain, under a claim of inheritance by adoption. The estate is a three anna share of Kismut Belgochee, pergunnah Tahnpore. The yearly produce was estimated at 7,051 rupees, 10 anas, 1 gunda. It had come into the possession of Kasheekaunt Roy, the defendant, by an award of the Collector, who, on the death of the Rancee, entered the lands in his name, to the prejudice of Ishwurchund. It was set forth in the plaint, that Bhyroo Indurnarain executed, on the 2nd *Aghun*, 1202, B. S. a deed, empowering his wife to adopt a son after his death, and to make him heir to all his property; that the said Bhyroo Indurnarain died suddenly in the Bengal year 1204, and his whole property devolved upon his widow, Juggut Ishwuree, who continued in possession until *Chey*t 1213, when she died, having no child living; that a short time before her death, she adopted Ishwurchund.

(a) This doctrine was followed in a former case. *Eshanchund Rai v Eshorchund Rai*; vide vol. 1, page 2. But for the more recent doctrine held on the above points, see the case of *Bhowannychurn Bunhooja* against the heirs of *Ramikaunt Bunhooja*, decided on the 27th of December 1816.

chund Roy, the ward of the plaintiff, agreeably to the written permission of her husband, and executed a deed, transferring to him the estate on her death, with a separate *wuseeutnameh*, nominating Gungaram, the plaintiff, guardian, during her adopted son's minority. That, immediately on her death, the plaintiff went to the Collector to get the estate entered in the public records in the name of his ward; but the Collector, after a summary investigation, gave a preference to the title of the defendant, who claimed as donee and son-in-law of Juggut Ishwuree. This action was therefore brought to gain possession of the property appertaining to Ishwurchund Roy, as the adopted son of Bhyroo Indurnarain. The defendant, in answer, alleged, that the story of the adoption, and the documents by which it was said to be supported, were fabrications. The case was stated by him as follows: Bhyroo Indurnarain died suddenly, at the age of thirty, in 1204, B. S. having been killed by the accidental falling of a roof. He left a daughter, who was betrothed by his widow shortly after his death, to Kasheekaunt Roy, the defendant, a Koolcen Brahmin; and at the same time she (the widow) made over the whole of her property in joint gift to defendant, and to her daughter, who was betrothed to him, with the condition, that, during her life, every thing should be carried on in her own name, and that the transfer was not to be completed till after her death. The two donees being minors, she further executed a deed, appointing the father of the defendant trustee and manager of the estate, during their nonage. Both these deeds were dated 23d *Assar* 1207, and were registered under regulation 36, 1793, on the 12th of July 1800, corresponding with the 30th of *Asarh*, of the Bengal year 1207. The marriage was consummated in the Bengal year 1212, and the daughter of Ranee Juggut Ishwuree died on the 12th *Phagun* 1213. The Ranee herself died on the 17th *Chey*t of the same year, leaving defendant sole proprietor of the estate. The whole of this statement was admitted by the plaintiff in his replication; but the adoption of, and gift to his ward (which he said took place in the interval between the daughter's and the Ranee's death,) were pleaded as conveying a better title, and implying a virtual revocation of the previous gift; the Ranee's interest in behalf of her son-in-law having ceased on her daughter's death. The plaintiff filed the following exhibits, 1st, The *yazutnameh*, or deed of permission to adopt, bearing date 2nd *Aughun*, 1202, B. S. and proved by the evidence of five subscribing witnesses. 2nd, The *hibbanameh*, or deed of adoption and gift, executed in favour of Ishwurchund, by the Ranee in 1213, B. S. to support which deed none of the subscribing witnesses attended, except the plaintiff himself, (Gungaram Bhaduree,) whose name was amongst them. 3d, The *wuseeutnameh* appointing the plaintiff guardian and trustee, during Ishwurchund's minority. This deed was dated the 10th *Chey*t, 1213, and three witnesses gave evidence in support of it. In addition to the above documentary evidence, three witnesses, on the part of the plaintiff, deposed, that the adoption had taken place in their presence. In the Zillah Court the Judge was satisfied of the authenticity of the *yazutnameh*, and conceived the adoption to be fully established. He accordingly put this question to the pundit

1813.

of A: claim disallowed: proof of the permission to adopt being held defective; and the presumption being, that if ever granted, it had been subsequently cancelled. Decision not to bar claim of husband's relations against donee of the widow.

1813. of the Court : Whether a widow, having the written permission of her deceased husband to adopt an heir to his property, and intending to act upon that permission, has it in her power to transfer the property by deed of gift; and whether any previous donation would be cancelled by a subsequent adoption under such permission? The opinion of the pundit was, that a widow, having a permission to adopt, and having acted upon that permission, her adopted son would inherit the husband's property to the exclusion of all other donees of the widow. The Zillah Judge accordingly passed a decree for the plaintiff on behalf of his ward, on the ground of the adoption. On appeal to the Provincial Court, the following grounds appeared for questioning the fact of the adoption, and the authenticity of the deeds on which the proof of that fact rested. In the first place, there was great reason to suspect the *wuseetnameh* to be a fabricated deed; as, on the first investigation by the Collector, the plaintiff had appeared only in the character of *va'el* on the part of Ishwurchund, and had acted upon a *vukalutnameh*; nor was it till nearly sixteen months afterwards that this deed was first produced in the Zillah Court. It was also on unstamped paper, dated only seven days before the Ranees' death, and not registered. The subscribing witnesses were none of them respectable; one of them being a *park*, another a *burhundauz*, and the third a *fotehdar*; all dependants of Gungaram, in whose favour it purported to have been executed. In addition to the above grounds of suspicion, the signature, on being compared with that of other authentic documents, was found to differ considerably. The *hubbnameh*, or deed of gift in favour of Ishwurchund, was open to equal suspicion; and, moreover, had not been established by any evidence. The whole story of the adoption also appeared entitled to no credit; as, instead of being a public transaction in the presence of the relations and connections of the Ranees, and of respectable persons, (as is usual on such occasions,) the only persons who were stated to have been present, were Gungaram, a *khansamah*, a barber, and another person of as little respectability: moreover, no public intimation of the circumstance had been given to the Collector, or the Court, which, as the Ranees were landholders, it was her duty, as well as customary, to do. It was besides alleged to have taken place only seven days before her death, and at the time of her mortal illness, when her daughter's death was yet recent, and her affection for her son-in-law unimpaired. Against the validity of the *ijazutnameh*, there appeared the following objections: It was dated the 2d *Aghun*, 1202, at which time Bhyroo Indernarain was dangerously ill: he recovered, however, and lived two years after; in the course of which period he had a son and daughter; so that, had he ever given such permission during this dangerous illness, he would, without doubt, subsequently have recalled and cancelled it on the birth of his children. He died also in the prime of life, at the age of 30, when he could not despair of having a son, though the last had died; his wife having already had two children. Neither had he the least forewarning of his death, as it was occasioned by the sudden falling of a roof. A deed therefore, executed two years before, under such circumstances, would at any rate

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kaunt Roy.

have been considered as invalid. There were, however, grounds to believe it was not authentic, as it was not registered; and between the date of its execution and the time of the alleged adoption (a period of thirteen years), not the slightest mention had ever been made of it, nor did any of the Ranee's relations or connections ever hear of it, until produced by Gungaram, in support of the story of adoption, before the Collector. The witnesses by which it was attested were also his dependants, and not respectable. While the statement of the respondent was open to these suspicions, that of Kasheekaunt Roy was altogether undisputed. Gungaram, indeed, was himself the person who had procured the registry of the deed of gift in defendant's favour; and of the deed under which his father had continued in charge of the estate, from the date of its execution to the expiration of the nonage of his son and daughter-in-law. The Provincial Court therefore put a question to their pundit in the following form: Whether, after the execution of a deed of gift, of the nature of that in favour of Kasheekaunt, her son-in-law, the Ranee had the power of adopting a stranger; and whether, if she did adopt one, he would inherit to the exclusion of the donee? The pundit made answer, that the power of adoption would depend upon the fact of the permission from the husband; but that, as the prior gift was every way binding upon the Ranee, the son so adopted would not inherit her property to the exclusion of the donee; nor could the deed of gift be set aside. Taking into consideration all the circumstances of this case, the Second and Third Judges of the Court of Appeal concurred in rejecting the story of the adoption, as altogether unworthy of credit. The decree of the Zillah Court was consequently reversed, with full costs against respondent. Not satisfied with this decision Gungaram prosecuted a further appeal to the Sudder Dewanny Adawlut, where it was determined, that the whole title of Ishwurchund Roy rested upon the validity of the *ijazutnameh*, or authority for his adoption, stated to have been granted by Bhyroo Indurnarain; which being set aside for the reason above stated; the claim founded on his adoption could not stand, even though the evidence in support of it was less open to suspicion than it appeared to be. The decree of the Provincial Court was accordingly affirmed by the Sudder Dewanny Adawlut (present W. E. Rees), and the appeal dismissed with costs. As, however, the relations of the husband of Juggut Ishwuree presented a claim as heirs of Bhyroo, deceased, it was inserted in the decree, that they were at liberty to sue the respondent in the Zillah Court, when the validity of the transfer by gift to their exclusion would come under consideration; and that the decision of this case should not affect such action on their part.

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Gungaram
Bhadoree,
v. Kasheekaunt Roy.

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Feb. 24th.

MAHARAJAH GRISCHUND RAI, Appellant,

VERSUS

BYKUNTHPAL CHOWDREE and KASHENAUTH PAL
CHOWDREE, (Sons of SUMBOONAUTH PAL,
deceased), Respondents.

For consideration received, A, engages to effect a release of lands mortgaged by him to B, and make over the same to C, or in default of his effecting the release of the lands in question, to make over other lands of equal value: A, fails in effecting the release; C, claims other equivalent lands; or (in a supplementary plaint) to recover the consideration Principal and interest of sum advanced by C, decreed against A, but no land; the engagement not being sufficiently specific to maintain a claim for land.

THIS was an action originally brought in the Zillah Court of Nuddea, but removed to the Provincial Court, on the enactment of regulation 13, 1808. It was set forth in the plaint, that Maharajah Grischund Rai, the defendant, was proprietor of a talook, named Deryapore, containing twenty-one mowzas, which talook he had mortgaged by a deed of *bye-bul-wufa*, or mortgage and conditional sale, to Durrup Narain and Ramlochan, in security for the sum of 10,000 rupees advanced by them; that on the 16th of *Jeyt*, 1213, which was before the sale became absolute, the defendant sold the same talook to Sumboonauth Pal, father of the plaintiffs, for the sum of 22,000 rupees, under a written engagement to the following effect: That the defendant should redeem the estate by payment of the mortgage money, and in the event of his failing to do so, or in the event of his acting in such a manner as to cause the estate to become absolutely vested in the mortgagees, he (the defendant) undertook to make over to the father of the plaintiffs other lands of equal value, situated in the pergunnah of Ookreh or elsewhere. The plaint stated further, that the defendant, after entering into this agreement, immediately offered to pay the debt of 10,000 rupees, for which the talook was mortgaged; that the offer not being accepted by the mortgagees, he applied to the Civil Court, depositing the amount of the debt as prescribed by the regulations; but that, having subsequently filed a *farogh-khutte*, or deed of acquittance, his application was dismissed, and the mortgagees continued in possession of the estate; that, under these circumstances, the defendant having refused to fulfil the terms of his engagement, to wit, to make over to the father of the plaintiffs other lands, situated in the pergunnah of Ookreh or elsewhere, which should be equal in value to the mortgaged estate, the plaintiffs now sued for the enforcement of that condition. A supplementary plaint was afterwards filed by the plaintiffs, suing for the recovery, with interest, of 22,000 rupees, being the sum advanced as purchase money for the mortgaged talook. The defendant in answer admitted the facts to be as stated in the plaint. The written engagement to make over other lands equal in value to the mortgaged talook, if not redeemed, was produced in Court, and the defendant acknowledged its authenticity; but pleaded that, the terms of the engagement were not sufficiently specific to support a claim to any particular lands, and that, therefore, he could only be liable to refund the sum advanced as purchase money, which he declared himself willing to do. The Provincial Court, on considering the case, were of opinion, that the terms of the engagement were not sufficiently explicit to warrant a decree of any particular portion of land; deeds having reference to land being required by law, to define the same specifically with the boundaries, or other distinguishing marks. The Court

therefore passed a decree, awarding to the plaintiffs the amount advanced in money, with interest at twelve *per cent*, to the date of the decree, amounting altogether to the sum of 31,577 rupees, 5 anas, 6 gundas, 2 cowries; costs to be paid by defendant. The Maharajah, obviously with the sole view of protracting the day of payment, appealed from the above decision to the Sulder Dewanny Adawlut. He rested his appeal upon an alleged irregularity in the conduct of the suit by the Provincial Court, because, in the original plaint, the action was not stated to be for the recovery of the money, but solely to obtain possession of the lands.

The Sudder Dewanny Adawlut (present J. Fombelle and J. Stuart) affirmed the decree of the Provincial Court, with interest upon the amount then decreed up to the date of the final decree. The costs were also made payable by the appellant.

BULDEO, Sircar, Appellant,

versus

1813.

RAJAH NURNARAYUN RAI, Respondent.

March 4th.

THIS was an action brought by Nurnarayun Rai, zemindar, A, a ze-
for the recovery of 24 mowzas, in pergunnah Bahree Moota, mindar,
Zillah Midnapore, held in lease by defendant, the yearly proceeds grants
of which were estimated at 5,105 rupees. It was set forth in the waste land
plaint, that Kishen Anund, the father of Buldeo, took a lease of B, on a
the lands in dispute (which were waste) on the undermentioned lease, with-
out limita-
condition, to wit: That the plaintiff's grandfather, who had given the
lease, or his heirs, might at any time have the option of period, but
with a con-
resumption, on paying the principal and interest of the amount dition of
disbursed by the leaseholder, in clearing the jungle and preparing resumption
the lands for cultivation. That the plaintiff, on coming into at any time
possession of the estate, called upon the defendant to furnish an on pay-
ment of all
account of such expences as he might have incurred in bringing expences
the land into a productive state, and gave him notice to quit the incurred by
premises, declaring his readiness to reimburse him for any sums B, in pre-
paring the
expended by him (the defendant) on the above account. That the land for
defendant, however, had contrived to throw different obstacles in cultivation.
the way, and had persisted in retaining possession; so that the A, claims
plaintiff had found it necessary to institute this suit. The defen- on resume
on per-
dant, in answer, admitted the facts contained in the declaration, forming the
but pleaded, that the lease, under which he held, gave him what above condi-
tion; B,
is termed a *jungleboory* tenure, which species of tenure is distinctly pleads sec.
declared in the 8th section of regulation 8, 1793, not to be resumi- 8, regula-
tion 8,
able. That the clause, therefore, in his lease, which stipulated a tion 8,
conditional resumption, being in opposition to a specific regulation, 1793, respec-
tively
was invalid; and besides, that such a clause was contrary to the jungleboory
usage of the country. He pleaded also, as a bar to this action, talooks as
that the case had twice before been decided by the Zillah Court, barring the
and both times in his favour: first on a suit of Nurnarayun, which condition,
was dismissed on the 14th of September 1798; and secondly, on and render-
ing his
a suit instituted by himself, in which he obtained a decree on the tenure irre-

1813. 28th of September 1801; both of which decisions had been confirmed on appeal to the Provincial Court. Copies of the decrees in these two cases were exhibited; and it appeared, that the former action was for the resumption of the same lands, on the same grounds as were shewn in this case. It had been given against the plaintiff, as he was then a minor, and his lands were not under his own management, but under that of the Court of Wards. The second suit appeared to have been brought by Buldeo; after a forcible dispossession by the plaintiff: when possession was restored to him, and in the decree of the Zillah Court, his hereditary *jungleboory* rights were recognized. The Judge of the Zillah Court, therefore, on trying the present suit, being of opinion, that the merits of the case had before been determined, particularly in the Zillah decree of the 28th of September 1801, in which the *jungleboory* rights of the defendant were amongst the grounds of the decision; did not think himself competent to take it up again, but dismissed the suit under section 16, regulation 3, 1793, wherein it is enacted, that "the Zillah and City Courts are prohibited from entertaining any cause, which, from the production of a former decree, or the records of the Court, shall appear to have been heard and determined by any former Judge, or any Superintendent of a Court having competent jurisdiction." On appeal by Rajah Nurnarayun to the Calcutta Provincial Court, the opinion of the Zillah Judge, respecting the application of section 16, regulation 3, 1793, to this case, was over-ruled, as the grounds of the first decision of 1798, were, that the appellant was then a minor, which would of course be no bar to a subsequent action, when this objection no longer existed. The second decision (of 1801) was considered as only a decree of restitution, of the description contemplated in section 3, regulation 49, 1793, after forcible dispossession; but that such decree left it open to the dispossessor to pursue the legal mode of prosecuting any claim of right he might possess, by regular suit; and though the question of the *jungleboory* tenure seemed to have been entered upon in the Zillah Court, and to have formed a ground of the decision, yet that the decree of the Provincial Court of Appeal, which superseded it, left that point undecided; and merely decreed restitution on proof of undisturbed possession for thirty years previously to the dispossession by force. The Court therefore entered into the merits of the claim for resumption, and seeing no reason to consider the clause stipulating for conditional resumption, which appeared both in the *pottah* and *kuboolcut*, as invalid or illegal, they determined, that the tenure was not inresumable, but that the option stipulated still rested with the lessor. It appeared, however, to the Court, that there would be some difficulty in adjusting the amount of the claim of the lessee to a reimbursement of expences. The decree therefore was to this effect, that the decision of the Zillah Judge should be reversed; and that an *aumern* should be deputed from the Zillah Court to form an estimate of the expences incurred in clearing and preparing the lands for cultivation, when, if the plaintiff should be willing to defray the amount of this estimate, with interest to the date of the decree, he should be put into possession of the land; but, if otherwise,

sumable. Determined, that the condition for the resumption is legal and valid. B pleaded two previous decrees in his favour as barring A's present action, but as the decisions in these cases did not affect the merits of the present action, the plea of B was over-ruled.

the land should remain in the possession of the original defendant. 1813.
The costs in both Courts to be paid by the defendant.

Buldeo Sircar not being satisfied with this decree, appealed to the Sudder Dewanny Adawlut (present H. T. Colebrooke) who confirmed the decision and orders of the Provincial Court, with this addition, that in case the parties could not agree in the appointment of an *aumeen*, or in the choice of an arbitrator, to determine the amount of the expences of clearance, &c. the determination of the amount should be left to the Zillah Judge, who might take evidence, or refer to the Collector of the district. It was also directed that the amount of the net proceeds of the lands, since the date of the decree of the Provincial Court, should be deducted from the charges of clearance, &c. and that the respondent should have the option of taking them, on defraying the amount of the remainder; or if such proceeds should appear to exceed the said charges, the respondent should be entitled to immediate possession, without being called upon to make any disbursement.

Buldeo,
Sircar, v.
Rajah Nur-
narayun
Rai.

LUKHEE DASEE, (Widow of JUGGUNAUTH DAS), Appellant, 1813.

versus

KHATIMA BEEBEE, ALI ASGHUR ABBAS, and ALIFUT-TEH ALI, (Sons of GHOLAM SHURKEE), Respondents. March 13th.

THIS was an action brought by Juggunauth Das, for the recovery of certain lands, the annual proceeds of which were estimated at 40 rupees; also for the amount of the profits enjoyed by the defendants from the date of dispossession. It was set forth in the plaintiff, that in the year 1791, A. D. (1198, B. S.) the profits of certain of several *hauts* and fisheries were exposed to sale by the Collector of Nuldea, and purchased by Juggunauth; that amongst these was the *julkur* of Kotae, which included a *jheel*, situated near the mouza Nuksha; that, since the date of the sale, the plaintiff had regularly enjoyed the *julkur* profits of this *jheel*, as of the rest of his purchase, and that his right had never been disputed; but that in the Bengal year 1203, the Dummooder river shifting its course, drained off a great part of the water of the *jheel*, inasmuch that, in 1204, a considerable tract of land, which had before been under water, was brought into cultivation by the neighbouring ryots. That the defendants, who were proprietors of the adjacent land, immediately seized upon whatever was left dry, and had enjoyed the profits to the present day. The defendants, in answer, admitted the above facts, but contended, that the plaintiff, who had purchased the *julkur* only, (or profits arising from the water, whether by fishing or otherwise), could have no right to any land under such a purchase; and that, whatever land might be left dry, by the failure or draining of the water, belonged to them, as *aymadaree* proprietors and possessors of the banks and contiguous lands. The parties therefore were at issue on this point, to wit, whether the purchaser of the *julkur* of a *jheel*, or lake, did or did not acquire a right, by virtue of his purchase,

A, purchases
at a public
sale by the
collector,
the *julkur*
jheels. One
of them
becomes
dry; and
it is deter-
mined,
that A's
purchase of
the *julkur*
only, does
not convey
any prop-
erty in the
lands;
which
belongs to
the proprie-
tor of the
jheel.

1813.

Lukhee
Dasee, r.
Khatima
Bee-bee,
Ali Asghur
Abbas, and
Alifutteh
Ali.

to lands, which were covered by the lake at the time of his making the purchase, and had since become dry. The Zillah Judge was of opinion, that the purchase of the *julkur* of a *jheel* gave no property in the land it covered, but merely implied, as deducible from its etymology, an exclusive right to all the profits and privileges arising from the water, without any relation to the land. The claim of the plaintiff, therefore, under a purchase of such proprietary right alone was rejected and the suit dismissed.

Not satisfied with this decision, Juggunauth appealed to the Calcutta Provincial Court. The Third Judge of that Court was of opinion, that the purchase of the *julkur* was, in fact, a purchase of the water, with all its advantages, as it then stood; and as there could be no doubt, that while the water covered the land, the bottom of the *jheel* was the property of the owner of the water, he argued, that, having once had exclusive right in the land, when it formed the bottom of his *jheel*, this right could not be shaken by the subsequent dereliction of the water; as therefore, it was admitted, that the land in dispute had once been under water, he thought the plaintiff entitled to possession, and that the decree of the Zillah Judge should be reversed. The opinion of the Senior Judge of the Provincial Court coincided with that of the Zillah Judge, whose decree was accordingly affirmed. After the demise of Juggunauth, his widow, on behalf of his son, a minor, petitioned for a special appeal to the Sudder Dewanny Adawlut, which was admitted, in consideration of the important nature of the case, as involving a general question; but, on trial of the cause, the decisions of the Zillah and Provincial Courts were affirmed by the Court (present H. Colebrooke); and it was finally determined, that the purchase of a proprietary right to a *julkur* (including a right of fishery, and other profits arising from the use of the water,) conveys no property in the ground covered by the water, and is a different thing from the purchase of a *jheel*, which includes the land, as constituting a part of the *jheel*.

SHEEOORAM GHOSE, Appellant, .

1813.

versus

DATARAM GHOSE, Respondent.

April 13th.

THIS was an action originally brought by Dataram, in the A and B Zillah Court of Bēerbhoom, (but removed to the Provincial Court are brothers. A of Moorshedabad, by the operation of regulation 13, 1808,) for the purchases an estate in the recovery of talook Sacuta, containing forty-five mouzas, the gross an estate in the produce of which was estimated at rupees 19,001. It was set the name forth in the plaint, that the contested lands had, in the Bengal of C his year 1208, been purchased by the plaintiff in one lot, as sold by nephew and public auction at the Board of Revenue, for 13,500 rupees; and son of B. that, not being inclined to have his own name appear in the tran- ved, that A saction, he had made the purchase in the name of Bishonauth, his and B have nephew, son of his brother Sheeooram Ghose, the defendant; that no property he intended the estate solely for his own benefit, so much so, that, in common, having received the bill of sale and order for possession, he deputed and that his own *Nuib* for the purpose of managing the lands, and had of the whole regularly enjoyed the profits thereof, until the year 1215, B. S. chase money was when, by collusion of his brother Sheeooram with the *tuhseeldars*, defrayed the rents and profits were withheld from him, and he was ultimately by A, who dispossessed. The defendant stated in reply, that the lands had having been purchased on account of his son Bishonauth, on whose behalf been in possession he (the defendant) had superintended the management of them; of the estate but that, at any rate, the exclusive right to the lands could not be the estate for vested in the plaintiff; they having been purchased with the seven years joint property of three brothers, viz the plaintiff, himself the after the defendant, and Doola Ram. In support of the second plea, a purchase, petition, signed by the third brother (Doola Ram), was presented, enjoyed claiming a share in the lands on the grounds of his joint property all the in the purchase money, and praying that a reservation of his right profits resulting might be inserted in the decree. It appeared in evidence, that, therefrom, for a period of seven years subsequent to the purchase of the lands, the pre- the profits were regularly transmitted to the residence of the plain- sumption is tiff, where he paid the revenue to the Collector, and, if the remit- that he tances were not sufficient, advanced the rest from his own property; it solely that all references for the administration and management of on his own the estate were made to him, and all applications for sanctioning account, disbursements, or for granting remission of rent to the ryots, were and not transmitted for his orders. Sheeooram, the defendant, sometimes for the ne- acted as superintendent under the plaintiff, but never on his Decision phew. own authority; much less had he the entire management on the in favour part of his son, as stated by the defendant. It appeared, also in of A ac- evidence, that the brothers had succeeded to no property on the cordingly. death of their father; that even the expences of his funeral were de- frayed by a loan, neither had they since acquired property by any joint transaction, and that the plaintiff was the only man of substance in the family, owing to an official situation which he filled. The defendants had declared, that the joint funds of the family were lodged in the banking-house of one Jugomohun Seat, whence, according to the acknowledgment of both parties, the purchase money of the lands had been drawn. But the books of that

1813. banking-house were produced by the plaintiff, and it appeared, that the entries were solely in his name, and accorded with his statement of the manner and time of making each payment. There was nothing to justify a supposition that any account was there opened with a joint concern, or that the plaintiff represented his family. Of this fact, had there been any proof, the defendant would have, of course, adduced it; but he did not attempt to establish the assertion of the lands having been purchased with joint funds, or even of the existence of any joint funds in the family. Under these circumstances, the Provincial Court rejected both the pleas of the defendant, and considering it fully established, that the estate was purchased by Dataram, the plaintiff, for his own benefit, and with his own money, passed a decree in his favour with costs, and declared the defendant further liable for the amount of the collections, from the day of dispossession; the amount of which, the Judge was directed to ascertain, and cause to be delivered up to the plaintiff.

Sheooram
Ghose, v.
Dataram
Ghose.

Not satisfied with this decision, the defendant preferred an appeal to the Sudder Dewanny Adawlut. It was in this Court thought necessary to take the evidence of Jugomohun Seat, and the other partners in his mercantile house, with a view to place the matter of the joint concern beyond the possibility of doubt. The evidence of these persons confirming the statement of the respondent, respecting his sole property of the money paid for the estate, and the Court being of opinion, that the fact of the lands having been purchased in the name of the nephew of the respondent was not conclusive evidence of their having been purchased on his account; the decree of the Provincial Court was affirmed with costs against the appellant. (a)

(a) It was not a question before the Court, how far the purchase was regular or otherwise, under the third clause of section 29, regulation 7, 1799, which provides, that "all purchases of land at the public sales are required to be made in the names of the persons actually purchasing the same, without any fictitious substitution of the name of any other person whatever. It is declared, that any evasion of this rule will render the lands purchased in opposition to it liable to confiscation to Government, or to such other penalty as the Governor General in Council, on consideration of the circumstances of the case, may think proper to impose." But the discretion thus reserved to Government, could not affect the rights of the parties in the cause before the Court, nor could the decision in this case bar the full exercise of the powers reserved to Government by the regulation.

RAMKAUNT DUTT and RADHAKAUNT DUTT, Appellants, 1813.

versus

GHOLAM NUBBY CHOWDREE, Respondent.

May 10th.

THIS was an action brought by Ramkaunt Dutt and his brother, to recover possession of the share of a talook, in pergunnah Mirzanugur, from which they had been dispossessed by Gholam Nubby the zemindar. The yearly proceeds of the share claimed were estimated at 920 rupees. The plaintiffs stated, that their father had obtained from the former zemindar a *tushkheese* talook of certain lands, in pergunnah Mirzanugur; that, on his death, it devolved upon his four sons, who, for some time, jointly held undisturbed possession; that in 1210, B. S., the defendant attached the talook, and sent a *suzawul* to measure and reassess it; the *suzawul* made the *mofussil* collections in that year, and in the beginning of the following a further lease was offered to the plaintiffs, with an enhancement of rent to 1,246 rupees, 10 anas, 16 gundas, for their share; that they refused the tender, conceiving the demand excessive, and were finally ejected in consequence. This action was accordingly brought to recover possession, together with the mesne profits of the period during which it had been withheld. The right of annual re-adjustment of rent, at the pergunnah rate, was admitted by the plaintiffs to be a condition of the *tushkheese* tenure, but as their objection was to the amount demanded, and the data on which it was calculated, the Court farther moved to fix the rates for which the plaintiffs were to be liable in future. The facts stated in the plaint were admitted by the defendant, but he maintained, that the rent demanded had been fixed after a survey and careful ascertainment of what was usual in the pergunnah, and that the course he had adopted was fully justified by the terms of the plaintiff's tenure. The point at issue in this case was, whether the rent demanded (1,246 rupees, 10 anas, 16 gundas), was in conformity with the pergunnah rate, or in excess of it. The plaintiffs urged, that the measuring rod made use of by the defendant in his survey was an unfair one, being too short, and yielding therefore too many *cannees* (a) to the area; also, that the assumed rate, which was 9 rupees, 6 anas, *per cannee*, considerably exceeded that which was common. In order to determine these points, an *aumcen* was deputed by the Zillah Judge, with orders to remeasure the whole, as well as to examine the *mofussil* papers of the parties, and what evidence he could procure on the spot, with a view to ascertain the *nirkh*, or rate *per cannee*, current in the pergunnah, in which the talook is situated. The report of the *aumcen* stated, that altogether he found 18 drones, 10 cannees, 18 gundahs and 3 cowries of land, in the talook claimed by the plaintiffs; of this quantity, 8 drones, 9 cannees, 13 gundahs, 1 cowrie only, were fit for cultivation, and liable to assessment. The rate *per cannee* he reported to be 6 rupees, 4 anas yearly; so that the rent to which the talook was liable, would, under this calculation, appear to be 860 rupees, 6 anas, 5 gundahs.

(a) Chittagong land measure, 4 cowries make 1 gundah, 20 gundas 1 cannee, 16 cannees 1 drone.

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Nubby
Chowdree.

To this assessment and to the *aumeen's* report generally, three objections were put in by the defendant; 1st, to the measuring rod, by which the survey was made, which was one of twenty cubits of twenty inches, whereas the customary cubit he stated to be only of about sixteen inches. This objection was however over-ruled, as the *aumeen*, when he first prepared to make the survey, had found a difficulty in determining the rod with which to make it, and had reported to the Judge this difficulty, transmitting a cubit measure of eighteen inches, which had been produced by the plaintiffs, and which bore the collector's seal and signature: twenty of these were said to form the *nul* or measuring rod (of thirty English feet); also another measure called a *sicundaree guz*, which was produced by the defendant, who declared that nine and a quarter of this formed the *nul* in ordinary use. From evidence taken and transmitted by the *aumeen* at the same time, it would appear, that a *sicundaree guz* should properly measure two feet ten inches. The one produced by the plaintiffs, was, however, deficient by four feet. The Judge, not being satisfied with either of these rods, prepared one himself, which was that with which the survey had been made by the *aumeen*; and to this, of course, he would receive no objection. The second plea was against the rate *per cannee*, reported by the *aumeen*, which, instead of 6 rupees, 4 anas, the defendant declared to be upwards of 9 rupees, 6 anas. This objection was however overruled, on the grounds, that the defendant, when required by the *aumeen* to summon any of the neighbouring *talookdars* in support of his statement respecting the current rates, had refused to do so; while that reported was conformable with the rates of several leases in the neighbourhood, the deeds connected with which had been produced by the plaintiffs; besides, that the rates of preceding years appeared to be conformable to it. The Judge also observed, that, in the papers of two settlements of the lands in dispute, made in 1204 and 1211, which had been adduced by the defendant in support of his statement of the rate, an extra charge for *salamee*, at the time of the *Dussurah*, as well as some other charges, seemed to have been included; these he thought illegal charges of the description of *abwab*, or exactions in excess of engagement, forbidden, under the terms of the decennial settlement, to be levied after the year 1198. He therefore fixed the rate according to the *aumeen's* statement, which was founded on the *bundobustee* papers of 1195, excluding the *abwab*. The third objection was general to the whole report, which the defendant alleged to have been partial to the plaintiffs and unfair towards himself. The objection was however over-ruled, as, from the public manner in which the survey and enquiries had been made, and the respectable signatures which appeared in attestation of the report, there was no room left to doubt that it was perfectly fair and equitable. The Judge, therefore, on the ground of this report, passed a decision in favour of the plaintiffs, decreeing possession to them, and fixing the assessment in the present instance at 860 rupees, 6 anas, 5 gundas. The zemindar was, however, declared to possess his power of annual survey and assessment unimpaired, so that he abided by the rate *per cannee*, fixed in this decree, and the measuring rod of twenty cubits of twenty inches.

A refund was also awarded to the plaintiffs to the amount of 386 rupees, 4 anas, 11 gundas, being an excess they appeared to have paid for one year beyond the above amount of rent. 1813.

Not satisfied with this decree, Gholam Nubby, the defendant, preferred an appeal to the Provincial Court of Dacca, on the ground of objections to the *aumeen's* report. The Court of Appeal conceived the two points at issue would best be determined by calling upon the Collector to state the rate *per cannee*, and by enquiring of the Board of Revenue by what description of measuring rod the different estates in the neighbourhood were surveyed and assessed at the time of the decennial settlement. The Collector reported the *nirkh* of such of the lands in dispute as were situated near Chunder Kalah, to be 9 rupees, 6 anas, and those near Denea and Bhooanepore, to be 7 rupees, 8 anas. This rate was taken from papers filed in the Collector's office in 1208, relating to former settlements of the same lands. The Provincial Court therefore judged it proper to allow the rate claimed by the appellant, or 9 rupees, 6 anas for the whole talook. The Board of Revenue, in answer to a reference on the subject of the measuring rod, sent up a correspondence, shewing that the survey, upon which the decennial settlement had been made in that part of the country where the land is situate, was with a rod of ten of the *sicundaree guz*, each *guz* being two feet eight and a half inches; and that this was intended to be the same as that used by the zemindars towards their talookdars. The Provincial Court therefore rejected the rod which had been arbitrarily imposed by the Zillah Judge, and fixed the standard at eighteen cubits of eighteen inches, conforming with that with which the settlement had been made by Government. Upon these grounds, that part of the decree of the Zillah Judge, which determined the present *jumma*, and laid down rules for the future assessment, was amended; and the zemindar was declared at liberty to survey the lands at any time with a rod of eighteen cubits of eighteen inches, and to fix the *jumma* at the rate of 9 rupees, 6 anas *per cannee*, annually. For the present, also, the survey of the *aumeen* being considered as a fair one, the *serishtadar* was directed to calculate the difference between his assessment and what would have been yielded by a rod of eighteen cubits of eighteen inches, and a rate of 9 rupees, 6 anas *per cannee*; and the respondents were declared liable for the latter.

Ramkaunt and his brother being dissatisfied with this assessment, prosecuted a further appeal to the Sudder Adawlut, and rested the appeal on three grounds: 1st, that the rod ordered by the Provincial Court was not that in ordinary use; 2nd, that the rate *per cannee* was higher than the *pergunnah* rate; and 3d, that in the Provincial Court's decree no deduction had been made from the quantity of land yielded by measurement, on account of *jeebka* (a) or *muttan* (b), which, by the custom of the country and the nature of the *tushkheesee* tenure, appellants were entitled to, free of assessment, viz. as *jeebka*, 4 cannees *per drone*; and 3 cannees

(a) *Jeebka* is a portion of land, granted as an allowance for the maintenance of a family.

(b) *Muttan* is a portion of land allotted by a zemindar, as a remuneration for bringing waste lands into cultivation.

Ramkaunt
Dutt and
Radha-
kaunt
Dutt, v.
Gholam
Nubby
Chowdree.

1813. 4 gundas, as *muttan*. With respect to the first of these grounds, the Courts (present H. Colebrooke and J. Fombelle), were of opinion, that both the Zillah and Provincial Court had made use of rods arbitrarily imposed, while the parties could only be bound by that in ordinary use; they therefore proceeded to enquire which rod was in most common use, and it appeared, that the witnessed before the *aumeen* and the Judge had agreed in declaring, that they had known of no other than one of twenty cubits, before the time of the decennial settlement; and though they varied in their account of the length of the cubit, the greater and most respectable part of them had declared in favour of that which had been produced by the plaintiffs before the *aumeen*, which bore the seal of the Collector, and was of eighteen inches. The Sudder Dewanny Adawlut therefore gave the preference to this, especially as the *sicundarte guz* was admitted by the witnesses on the part of the respondent, not to have been used prior to the decennial settlement. With respect to the second ground of appeal, viz. the rate *per cannee*, which the appellants declared to be but 6 rupees, 4 anas, while the respondent maintained that it exceeded 9 rupees, 6 anas; it appeared, that, in 1204, a settlement had been made for these lands, in which the latter rate was acknowledged for a part of the lands, and 7 rupees, 8 anas for others, agreeably to the statement of the Collector; according to the former of which, the rate had been assumed by the Provincial Court. The appellants had indeed objected, that the papers relating to that settlement were signed by an agent only on their part, and they maintained that he had exceeded his powers in so doing; but this was overruled, as the settlement in question had continued for four years; and the rent had been paid at the rate then entered in the *karbooleet*, until the expiration of its term. The Court were therefore of opinion, that the rate should be assumed at 9 rupees, 6 anas for part, and 7 rupees, 8 anas, for the remainder, in the manner determined in the previous settlement. But this sum included the *abwab* and *salamee*, which the Judge had thought should be deducted; the provisions of regulation 8, 1793, having directed, that the whole should be consolidated in forming a permanent assessment, and the prohibition being held to apply to any future excess after such consolidation. With respect to the third ground, viz. the claim for a deduction for *jeebka*, &c. it was admitted by the respondent, that the appellants were entitled to it for some of their lands, but not for all. This was corroborated by the papers of an assessment which took place in 1195, wherein the deduction was only made for a part of the lands. It appeared, however, that, in the assessment of 1204, the papers of which were exhibited by the respondent, and formed the basis of the rate now fixed, this deduction had been unconditionally made upon the whole of the lands. The appellants were therefore considered to be entitled to the deductions generally at the rate before allowed by the *zemin-dar*. The Court accordingly decreed, that the survey should be made with a rod of 20 cubits of 18 inches; and after deducting 4 cannees *per drone*, as *jeebka*, and 3 cannees, 4 gundas *per drone*, from the remainder, as *muttan*, the quantity of land ascertained by the survey would be assessed at the rate of 9 rupees, 6 anas, if

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In the neighbourhood of Chundra Kalah, and 7 rupees, 8 annas; if in Denea and Bhooaneepore. These rates were to be considered inclusive of *abwab* and *salamee*. For past years also, the assessment was to be calculated at the above rates; and respondent required to refund all that he might have levied from the ryots, kaunt or otherwise obtained, exceeding the amount yielded by this calculation. The Zillah Judge was to see this part of the decree executed, and each party were to pay their own costs.

1813.

Ramkant
Dutt and
Radha-
kaunt
Dutt, v.
Gholam
Nubby
Chowdree,

RANEE BHUDORUN, Appellant,
versus
HEMUNCHUL SINGH, Respondent.

1813.

May 15th

THIS was an action brought by Ranee Bhudorun, for the recovery of 11,383 rupees, 5½ annas, 1 gunda, part of the proceeds of talook Rooroo, illegally withheld by Hemunchul Singh, during the *Fuslee* years 1210, 1211 and 1212. It was stated in the plaint, that the talook of Rooroo was the hereditary property of Rajah Khooshal Singh, the deceased husband of plaintiff; that, on default of other heirs, it had been possessed and managed by herself; that, previous to the year 1210, the talook in question was annexed to the lands of Koonwur Chundder Singh, who held several talooks under her; but, in that year, being separated from them by her order, a settlement was made for it with Government, in the name of defendant, at a *jumma* of 51,368 rupees, as fixed by the Collector. That the defendant, however, from the time he first obtained possession, began a series of mismanagements, injurious to the estate and prejudicial to her interests; and that consequently, in 1213, plaintiff caused the said settlement to be annulled, and took the talook again into her own hands; that the defendant having appropriated all the profits that had accrued from the estate during the period of his possession, she now sued to recover the amount of those profits so unduly appropriated. The answer of defendant was, that, for the three years specified, he had held the lands in his own right, as sole proprietor; that the settlement with him was made by the Collector in own name, as would appear by his *kaboolcut*; and that he had the receipt of the *tuhseeldar* for the full amount of the *jumma* at which the talook was assessed; nor was he answerable to any one for any thing more. The claim of right in his own person was founded on the following circumstances: His grandfather and the husband of plaintiff were full brothers; the estate belonged to the latter, he however died childless, and of his six wives, two only outlived him. The defendant alleged, that the eldest of these, Rance Chunder Buns, had taken him from his infancy under her peculiar care, making him her *Gud'hee Nusheen*, nearly amounting to an adoption; that, on her death, he succeeded to the lands by inheritance; and that, when the triennial settlement was made in 1210, the Collector being satisfied of his right, had made it with him; and as proprietor had taken his *kaboolcut* without any reservation of the

At the formation of a triennial settlement for the conquered provinces, in 1210, F. S. A stood forward as proprietor of an estate, and entered into engagements with Government, held possession for that period. B, the real proprietor, then appeared, and sued to recover profits received by A; alleging that A acted on her behalf in making engagements for the lands, and under agreement to leave B in possession of her rights and profits; but

1813.

had fraudulently applied them to his own use. Claim dismissed, no written or her specific engagement between the parties being adduced by plaintiff.

zemindaree rights to any one, but himself. He put it to the plaintiff to produce any deed by which it could be proved that he held the lands otherwise than as zemindar, or was bound to share the proceeds with any one, but Government. The plaintiff in rejoinder asserted, that nothing similar to adoption had ever taken place with the elder Ranee, nor had defendant any right of inheritance, direct or otherwise; that, in fact, he was an only son and heir to the estate of another branch of the family, from which circumstance, according to the Hindoo law, he could not have been adopted; and that, as grand-nephew, he could have no claim of inheritance in his own person, when a wife was living; that, accordingly, on the death of the elder Ranee, the whole property of their husband had devolved upon plaintiff, the surviving wife and only heir; and that she had held undisturbed possession, until the triennial settlement of 1210. Plaintiff acknowledged that the settlement then made with the Collector was in defendant's name; but maintained, that this was by her directions, and therefore he was still to be considered as subordinate and accountable to herself in the same manner as all her other managers with whom she had pursued the same course: she urged, that her exclusive zemindaree rights were fully proved by the investigation which took place before the Collector, on the expiration, in 1213, 1214, of the triennial settlement made with defendant, when her claim being considered established, the ensuing settlement was made with herself, notwithstanding the opposition of defendant. The Judge called upon the Collector to report from the records of his office, upon the points at issue in this case, as far as connected with the two settlements. The Collector confirmed generally the statement of plaintiff, respecting the previous settlement in the name of Koonwur Chunder, as well as with respect to the result of the investigation in 1213, 1214; but with respect to the triennial settlement of 1210, 1211, he reported this to have been made with defendant, as the ostensible proprietor, with no reservation of rights to any one; whereas the settlement with Koonwur Chunder usually contained a reservation, by the insertion of a clause implying, that he entered into them in behalf of the Ranee. To prove that such reservation was implied in the settlement of 1210, also, plaintiff produced a letter addressed by herself to Koonwur Chund Singh, directing this talook to be separated from the other lands held by him, and the settlement to be made on her account, in the name of the defendant. This letter further directed Koonwur Chund to be defendant's surety: and it appeared, that he became so in consequence of such direction. From this the Ranee argued, that whatever loss had occurred, would have fallen upon herself; whence it might be inferred, she intended to reserve to herself some share of the profits. Witnesses were also produced by plaintiff, who deposed, that they had always understood the settlement of 1210 to have been on the Ranee's account, though in defendant's name. Defendant produced two witnesses in support of his claim of inheritance by adoption, but their evidence was very inconclusive. The Zillah Judge considering that the zemindaree rights of plaintiff, as inherited from her husband, were fully established, and that it was entirely through fraud that no reser-

vation was made of them at the time of the triennial settlement of 1210, was of opinion, that she was still entitled to the profits of which she had been deprived; and, as defendant had taken no exception to the amount claimed, he passed a decree in plaintiff's favour to that amount, with costs. 1813.

Ranee
Bhadorun,
v. Hemun-
chul Singh.

On appeal to the Provincial Court, it was determined, that, although the settlement, which was exclusively made with Hemunchul Singh, might have been fraudulently obtained, it nevertheless gave proprietary right for the time; and it was the duty of the Ranee, if she wished to set it aside, to have brought an action for possession within the period of its duration, when, if she succeeded in establishing her zemindaree right in the Civil Court, her name would have been ordered to be substituted for that of Hemunchul; but that, while the settlement subsisted, (as it had never been set aside), the sole responsibility to Government, and consequently the sole right for the time being, would rest with the person with whom it was concluded. The Provincial Court therefore, considering the zemindaree rights of the Ranee to have been suspended during the period of the triennial settlement concluded in 1210, rejected her claim to the profits.

On a further appeal to the Sudder Dewanny Adawlut being preferred by the Ranee, it was ultimately determined (present H. Colebrooke and J. Fombelle), that the settlement in the name of Hemunchul, though made without reservation, would not have set aside any engagement for the profits or otherwise, had such been proved against him; but for this, a specific deed in writing, or other equally conclusive evidence, was necessary, which was no where given in evidence or pleaded by the Ranee; her claim, therefore, for a share in the proceeds, without such an engagement, was deemed inadmissible, and the decision of the Provincial Court was affirmed, with costs against the appellant.

1813.

RAJAH GREESH CHUND ROY, Appellant,

versus

May 26th.

OMESH CHUNDER ROY and Others (Heirs of MOHESH CHUND), Respondents.

A, has an annuity payable out of B's estate; in a dispute respecting the rate, B enters into an engagement to pay to A the same sum annually as it may be decreed by court to other annuitants under similar circumstances; engagement held to be binding on B, from the date of execution, but not to have reference to previous balances; the engagement not containing any retrospective provision.

THIS was an action brought by Rajah Mohesh Chund, the father of respondents, to recover the sum of 31,000 rupees, arrears of an annuity, due to him from the estate of Rajah Greesh Chund, zemindar of Nuddea. It was set forth in the plaint, that, on the death of Kishen Chund, the common ancestor of plaintiff and defendant, the zemindary of Nuddea was not divided as prescribed by the Hindoo law, but was settled on Sheo Chund, the eldest son, by bequest of his father; and pecuniary provisions, payable out of the proceeds of the estate, were assigned as a maintenance to the rest of the family; that this bequest was confirmed by decree of the Courts. (vide page 2, vol. 1, of civil reports,) in a suit preferred by a younger branch of the family, to set it aside, and to obtain his legal share of the estate; that the decree in this case, however, provided for the regular payment of the annuities, and fixed their amount, and, amongst the rest, that of the plaintiff Mohesh Chund. That, on the death of Sheo Chund, his son Eshor Chund took possession of the estate, and on the plea, that from different causes it had greatly fallen in value, reduced the amount of all the annuities payable out of it, and tendered to each annuitant one-half of the amount of his original stipend, and to the plaintiff at the same rate; that the other parties immediately instituted suits in the Civil Court of the zillah, and that the plaintiff was about to seek the same redress, when Eshor Chund entered into an engagement to abide, in his case, by the decision which might be ultimately passed in those suits already instituted; promising, that "if their annuities were again directed to be paid in full, that of Mohesh should likewise be so paid; and if any reduction in theirs should be authorized, that of his should be reduced in the same proportion;" that the cases abovementioned were decided in favour of the plaintiffs in each, and they recovered the arrears of their respective annuities in full, from the time of reduction; besides securing, by order of Court, the payment of the old rate for the future; that there was consequently due to the plaintiff, in virtue of the engagement entered into with him by the defendant, the sum of 31,000 rupees, being the amount of arrears from the period of reduction. Eshor Chund having died since the institution of the suit, was succeeded by his son Greesh Chund, who became the defendant in the suit. After denying that any agreement, of the nature set forth by the plaintiff, had been made by his father, he entered into the same line of proof as had been attempted in the former suits, alleging, that the pensions and annuities had been fixed at a time when the estate paid upwards of ten lacks of rupees revenue to Government; but that now it had been so much reduced in value by sales, public and private, as not to yield two lacks; that his father had therefore been compelled to reduce the rate of the annuities, with which the estate was

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 burthened; and lastly, that the plaintiff had never objected to the reduction, but had always expressed his readiness to relieve the necessities of the zemindar to the utmost of his power. The plaintiff produced the written engagement before alluded to, on which his claim was founded, which document bore date 12th *Phalgun* 1204, and was couched in the following terms: "I, Eshor Chund, declare, that my uncle Ishan Chund has instituted a suit against me for the recovery of the full amount of, his annuity, and that Mohesh Chund is on the same account about to institute another suit; that, should the amount, decreed to Ishan Chund by Mr. Redfearn be again directed to be paid in full to him on his present suit, I will also pay Mohesh his annuity awarded to him by that decree, amounting to 6,000 rupees; that should any reduction of Ishan Chund's annuity be authorized by the Court, in the suit now pending, I will pay Mohesh Chund an annuity equal to that which may be settled for Ishan Chund." The authenticity of the above engagement was clearly established. The plaintiff also filed the decree in which his own annuity was fixed at 6,000 rupees, as well as the decree in one of the other suits, instituted by another annuitant, and alluded to in the written engagement, in which decree, the annuity was raised to the original rate determined in the former decree, and the arrears awarded since the date of the reduction. The Provincial Court considered the pleas of the defendant to be wholly unavailing, as being inconsistent with the terms of the engagement, the authenticity of which had been clearly proved; and being of opinion, that the plaintiff was entitled uniformly, to the rate fixed in the original decree, independently of the engagement, (which implied, that the same should be paid to the plaintiff, as might be decreed to the other annuitants) passed a decree in his favour for the amount claimed, with costs; providing, at the same time, that, if defendant could produce receipts, or other proof of the payment of a larger sum than the plaintiff had credited in the account, the Zillah Judge should receive such proof, at the time of executing the decree, and should deduct the excess thus proved from the amount awarded to the plaintiff.

Not satisfied with this decision, Rajah Greesh Chund preferred an appeal to the Sudder Dewanny Adawlut (present J. Fombelle and J. Stuart), where the decree of the Provincial Court was amended to this effect; namely, that the heirs of Mohesh Chund (he having in the mean time deceased) should receive the arrears due, on a calculation of the difference of rates between the original and the reduced annuities, from the date on which the engagement adduced by the plaintiff was entered into, up to the date of Mohesh Chund's death, but not for any antecedent period; it appearing to the Court improper to award arrears from the date of the reduction of the annuity, as the engagement, on which the claim rested, contained no provision for balances already due at the time of entering into it.

Rajah
Greesh
Chund
Roy, v.
Omesh
Chunder
Roy and
others.

1813.

GOURKISHWUR ACHARJEA, (adopted son of GUNGA
DIBEH CHOWDRAEN, deceased,) Appellant,

May 29th.

versus

SHEOO BUKHSH SING, Respondent.

The manager of an estate borrows money for the payment of arrears of revenue due to Government, giving a bond in the name of two proprietors, one of whom (since dead) had sole possession at the time, determined, that the manager is personally responsible for the amount in the first instance, with right of recovery from the heirs of the deceased possessor of the estate, on whose account the loan was contracted.

THIS was an action brought by Sheoo Bukhsh for the recovery of 695 rupees, the amount, principal and interest, of a debt on bond. The plaint stated, that, in the year 1201, B. S., considerable arrears being due to Government for an estate, called pergunnah Alaf Sing, Kishen Kinkur Ameen, the manager of the estate, borrowed from Sheoo Bukhsh, the plaintiff, the sum of 501 rupees, giving a bond for the amount, payable in one year, in the name of his employer, Sham Kishwur, and in that of Gunga Dibeh, a sharer in the estate. That the money was weighed by Sheoo Churn, and paid into the hands of Sham Acharjea, nephew of Sham Kishwur, who applied it to the liquidation of the arrears due to Government. Sham Kishwur having demised in the *interim*, the action was brought against Kishen Kinkur, Sham Acharjea and Sheoo Churn. Gunga Dibeh was not made a party to the original suit; the plaintiff having no evidence of her being concerned in the transaction, or of her having received any part of the money. The plaintiff filed the bond on which his claim was founded, and produced evidence in proof of its execution and of the payment of the money. The defendant, Kishen Kinkur, admitted having borrowed the money, and written the bond in the names of Sham Kishwur and Gunga Dibeh, (whose name was introduced, because she was a nominal proprietor, though Sham Kishwur had the entire management,) but maintained that he could not be responsible; the money having been applied to the liquidation of arrears which had accrued on the estate; and he having acted merely in the capacity of an agent for Sham Kishwur, as was evident from the terms of the bond, which specified that the sum was advanced for the Government revenue, and therefore, must have been on account of the proprietors of the estate. The other defendants denied generally all knowledge of the transaction. Under the acknowledgment of Kishen Kinkur, the Zillah Judge was of opinion, that he was answerable, in the first instance; but as it appeared from the statement of the plaintiff and the evidence of witnesses adduced in support of it, that the defendant, Sham Acharjea, was a party in the transaction; and as he had succeeded by inheritance to a 1 ana, 6 gunda, 3 cowry share of the estate, for the revenue of which the money was advanced, the Judge considered him liable for a proportion of the debt, and calculating the interest to the date of the decree, which raised the amount to 873 rupees, 8 gundas; decreed 724 rupees, 8 anas, 6 gundas against Kishen Kinkur, and 148 rupees, 8 anas, 2 gundas against Sham Acharjea: against Sheo Churn, who was no otherwise a party than from having weighed the money, the plaintiff's claim was dismissed. Kishen Kinkur preferred an appeal from this decision to the Provincial Court, on the plea, that as he only acted as an agent, he should not in equity be made responsible for a debt contracted in the course of his management, solely on

account and for the benefit of the owners of the land. The Provincial Court observing that there was no reason to doubt that Kishen Kunkur acted only as agent in the transaction, and that the money was taken up solely for the payment of the Government revenue due on the estate (an act to which a manager was held fully competent), considered the estate itself, and consequently the present holders of it, liable in the first instance. They therefore amended the decision of the Zillah Judge, by removing the responsibility from Kishen Kunkur to the other sharers, whether parties in the transaction or not. The sum for which Kishen Kunkur had been made liable was accordingly decreed against Gunga Dibeh, Chundun Kishwur, Brij Kishwur and Nubkishwur, who then appeared to hold the lands in joint property with Sham Acharjea, in proportion to their respective shares. On the application of Gunga Dibeh, for leave to prefer an appeal from this decision, she was first directed to apply to the Provincial Court for a review of their decree, and on the application being rejected, a special appeal was admitted by the Sudder Dewanny Adawlut; it not appearing that any of those against whom the decree was passed by the Provincial Court, had ever been heard in refutation of the claim. Gunga Dibeh having demised in this interval, her adopted son Gour Kishwur Acharjea appeared to prosecute the appeal. It was contended on behalf of the appellant, that Gunga Dibeh could not be liable for the share decreed against her, as the debt had been contracted at a time when she had nothing to do with the estate, and was for the revenue of a year antecedent to her possession. With the view of ascertaining the truth of this plea, a reference was made to the Board of Revenue; and from the answer it appeared, that at the date of the bond (January 1795,) the lands in question were entered in the name of Bishen Ram, deceased, father of Sham Kishwur, who was in possession and answerable for the revenue. It appeared also, that about six months after the date of the bond, Gunga Dibeh had presented a petition to the Collector, praying that another manager should be appointed, and that her lands should be separated from the rest of the estate; and that this was answered by a counter petition of Sham Kishwur, in which he maintained his sole undisturbed possession and proprietary right, in consequence of which counterpetition Gunga Dibeh's claim was rejected, and she was directed to bring an action in the Civil Court. Under these circumstances, and because Kishen Kunkur never declared himself the agent of any one, except of Sham Kishwur, the Court of Sudder Dewanny Adawlut (present H. T. Colebrooke and J. Stuart), were of opinion, that Sham Kishwur alone, if living, would be answerable for the amount of the debt, as being the only person in possession at the time it was contracted; and that there were no grounds for considering the amount a charge on the estate, for which, whoever might come into possession would be liable. The Court therefore reversed so much of the decision of the Provincial Court as declared the shares liable in their respective proportions; and decreed the amount due, with costs, against Kishen Kunkur, leaving him to recover from the heirs of Sham Kishwur.

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Gourkish-
wur Achar-
jea, v.
Sheoo
Bukhs
Sing.

1813.

MUSSUMMAUT NUNDKONWUR BEEBEE, (Pauper,)

Appellant,

June 21st.

versus

RAM LOCHUN SING, BUDDUN CHUNG SING; and
Others, Respondents.

Lands claimed as *lakhiraj* under title deeds registered in the *bazee zumeen duffur*, but differing from the records of that office, with respect to the lands specified on the back of the title deeds, held to be a valid tenure exempt from assessment, so far only, as the title deeds correspond with the records of the *bazee zumeen duffur*.

THIS was an action brought by Mussummaut Nundkoonwur, to recover possession of 537 beegas, 6 biswas of *lakhiraj dewuttur* land, from which she had been dispossessed by Ram Lochun and Buddun Chung, the auction purchasers of *kismut* Amdoobee, in which the said land was situated. The produce for ten years was estimated at 652 rupees, 15 anas, 10 gundas, and damages were also claimed to the amount of 9,919 rupees, 1 ana, 15 gundas, being the sum alleged to have been received by the defendants from the lands, during the period of dispo-session. The plaintiff stated herself to be the wife of Rajah Soondur Nerayon, who held the lands in dispute under a title of *lakhiraj dewuttur*, of which the original grants were not forthcoming, but there were three writings of Mr. Dynely, superintendent of the *bazee zumeen duffur*, confirming the title of Soondur Nerayon, and bearing date, two of them the 10th of January 1785, and the other the 5th of November of the same year. They were founded as appeared by their tenor, on *mofussil soorut hals*, duly attested and authenticated, shewing the hereditary right and possession of Soondur Nerayon and his ancestors, for several generations. These title deeds which the plaintiff pleaded to be of equal validity with an actual *sunnud*, were registered under regulation 19, 1793, in the years 1796 and 1797, and were duly numbered and signed by the Collector. At the back of each was a list of the villages, the title to which it conveyed. Soondur Nerayon made over the lands he held under these deeds to his mother, Roy Koonwar Beebee, who transferred them by gift to the plaintiff, a short time before her death. The deeds of gift were exhibited amongst the other papers, and not questioned by the defendants. Soondur Nerayon, the original holder, was also proprietor of the zemindaree Kasheejoia, which paid a revenue to Government. In the year 1796, he fell into arrears, and *kismut* Amdoobee of this estate, being sold in satisfaction of them, was purchased by Ramlochun and Buddun Chung the defendants, on the 3d of September following. To this *kismut* much of the *lakhiraj* land was attached. The defendants were at once put in possession of the whole of the lands paying revenue; but further claimed what the plaintiff was holding as *lakhiraj*. In 1206 *Umlee* (about 1798,) they got possession of the lands, and this action was brought by the plaintiff to recover them. The defendants maintained in their answer, that the plaintiff still held all the *dewuttur* lands to which she was entitled, and that what they had taken possession of were *malgoozaree*, alienated from the zemindaree and consequently included in the purchase; they admitted, that the plaintiff had originally a right to some *dewuttur* lands under different *sunnuds* and title deeds; but maintained, that the detail of the lands, as entered in those produced, was fabricated, and did not correspond with the

entries in the *bazee zumeen duftur*; that these deeds must therefore have been falsified, and ought not to be admitted. In proof of this assertion, the defendants produced copies of the records of the office above alluded to, in which the entries under the head of each of the title deeds as distinguished by its number, did by no means correspond with the detail at the back of those deeds. They also produced the *mofussil mouzu-warse* account of two years, with a view to show that much of the lands claimed by the plaintiff had paid a revenue for those years; and had not been uniformly held as *lakhiraj*. The defendants further set up a claim to resume the lands, even though they might be held as *lakhiraj*, under their general *zemindaree* rights, on the ground of the insufficiency of the title deeds exhibited by the plaintiff. This plea was however over-ruled, as the lands were of an extent exceeding one hundred beegahs, and therefore by the regulations, the right of resumption, if the title were invalid, would rest with Government alone. The Judge of the Zillah Court observed, that the certificates of the superintendent of the *bazee zumeen dufter* bore on the face of them evident marks of authenticity, having his confirmation and signature at length, and also the certificate and signature of the Collector who registered them, he accordingly admitted their validity *in toto*; and although the details at the back of them did not exactly correspond with the copies of the records of the *bazee zumeen duftur* produced by the defendants, he remarked, that there was no security that these copies might not have been falsified, especially as they did not appear to have been very clearly drawn out; nor were the records themselves very regularly or correctly kept. The statements in the plaintiff's deeds on the contrary did not exhibit the slightest erasure, or alteration; nor was there the least reason to think they could have been written at a different period from that alleged, as they bore the signature of the *Dewan* and *Omla* of the superintendent of the time, and were on the same paper with the deeds themselves. On the above grounds, the Zillah Judge thought the plaintiff entitled to possession of all the lands mentioned in the statements, at the back of Mr. Dynely's certificates, that had not been since resumed by Government, and that the defendants could have no claim to such lands. With respect also to the claim for damages for what had been received by the defendants during the period of dispossession, the Judge thought the plaintiff entitled to recover the amount claimed, which seemed very equitably calculated. He therefore passed a decree in favour of the plaintiff, with full costs against defendant Ram Lochun Singh, and Buddun Chung Singh, preferred an appeal from this decision to the Calcutta Provincial Court, where a difference of opinion arose between the two Judges who sat upon the case. The Officiating Second Judge concurred with the Zillah Judge in giving every credit to the title deeds produced by Mussumaut Nund Koonwur, and conceived it proved from them, that the lands in dispute had been *lakhiraj* from a period antecedent to the decennial settlement, whence there was no reason to believe they could have been included in the purchase of the appellants; especially as the *lothundee* of the sale did not appear to contain any of the items detailed in

1813.

Mussum-
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Sing and
others.

1813.

Mussum-
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v. Ram
Lochun
Sing, Bud-
dun Chung
Sing and
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them. Although therefore the title to the *lakhiraj* tenure might not be perfect, still, as the lands held under it exceeded one hundred beegahs, and the plaintiff had been in possession before the decennial settlement, the Second Judge conceived that the right of resumption would rest with Government alone; and that the appellants could have no right to interfere, much less to dispossess the respondent of their own authority. He thought therefore, that the decree of the Zillah Judge should be confirmed, as far as it restored possession to respondent: but with respect to the claim for damages, the Second Judge remarked, that they were estimated entirely according to the calculation of the plaintiff, and that no evidence, or other proof had been adduced in support of her statement. He was consequently of opinion, that, as this claim involved a different point, a separate action should have been brought for it; and that, even in the present stage of the business this should be directed. The Senior Judge of the Provincial Court was of opinion, that the decree of the Zillah Judge should be reversed. The title deeds of the respondents he conceived to be of very questionable validity, from the circumstance of the great variations which in many instances appeared between the details of the lands at the back of those deeds, and the entries in the records of the *bazee zumeen duftur*. He remarked, that the copies of these records, which the Zillah Judge had been disposed to reject, were authenticated with the signature of the present Secretary to the Board of Revenue, and could not therefore be doubted; but that the signatures on the certificates were of a long time back, and might have been forged or collusively obtained. He remarked also, that the *mou-zawarce* account of the *jumma* of Amdoobee for two years (1201 and 1202, *Umlee*), filed by the defendants, conformed in some respects, and particularly in the amount of the *jumma*, with the *lothundee* account prepared on the occasion of the sale of the *zemindarce*; and in this account several of the lands, stated in the certificates to have been granted as *lakhiraj*, were entered as assessed with a *jumma*: this he thought afforded a further reason for the rejection of those documents. Under these circumstances, the Senior Judge thought the appellants entitled to possession of the contested lands, as a part of their purchase; and that the dispossession was legal on their part, under section 10, regulation 19, 1793: According to a provision in the regulations then in force, which gave the Senior Judge of the Provincial Court a casting voice, in cases open to a further appeal to the Sudder Dewanny Adawlut, a decree was given by the Provincial Court in conformity with the opinion of the Senior Judge. The respondent, Nund Koonwur, preferred an appeal from this decision to the Sudder Dewanny Adawlut, where it being thought necessary that the authenticity of the copies of the records of the *bazee zumeen duftur* should be placed beyond a doubt, the originals were sent for from the Board of Revenue. On comparison, the copies proved to be perfectly correct. In comparing also the entries in these records with the deeds themselves, according to their numbers, there could be no doubt of the authenticity of the body of them. But considerable variations appeared in the details of the lands endorsed on the deeds, and in those statements entered in the

records. The cause of this it was impossible to trace, but in determining the extent and situation of the land held under a title admitted to be good, it was necessary to abide by one or the other statement; and the preference of authenticity was of course given to the official records. In this view of the case, it was determined, that the purchase of the respondents gave them no right over any of the lands held free of assessment by the appellant, if entered in the record of the *bazee zumeen duftur*; and that the appellant was entitled to recover any of such lands from which she might have been dispossessed by the respondents. The decree of the Provincial Court was therefore thus amended (present H. Colebrooke and J. Fombelle): possession was decreed to the appellant of all lands included in her title deeds, as far as entered in the records of the *bazee zumeen duftur*, and it was declared, that whatever might not have been so entered, must be presumed to have been subsequently alienated from the *zumeendaree*: and is therefore resumable by the purchasers of the *zumeendaree* title, under the provisions of section 10, regulation 19, 1793. To render the decree more specific, a list (drawn up from a comparison of the deeds with the records) of all the lands to which the appellant would be entitled under the above provisions, was added to it, and it was declared that she could have no claim upon any others. By this list it appeared that instead of 1,766 beegas, 5 biswas to which the appellant laid claim under her three title deeds, she was only entitled to 887 beegas, 10 biswas. This land was however decreed to be her right, whether she had ever been dispossessed from it by the respondents or not. It was further provided that each party should pay their own costs in all three Courts.

1813.

Mussum-maut
Nundkoon-
wurBeebee,
v. Ram
Lochun
Sing, Bud-
don Chung
Sing and
others.

FRANCIS ROUSE, Appellant,

1813.

versus

ALEXANDER HAIG and Others, Respondents.

June 26th.

THIS was an action brought by Alexander Haig and others, A, an indigo planter, to recover damages from Francis Rouse, also an indigo planter, for having forcibly cut and taken away the plant from the lands of several ryots, who had received advances from the plaintiffs, and entered into engagements to deliver the whole produce of their lands to the plaintiffs factory. The damages were laid at 4,685 rupees, being the average value of the quantity of indigo which might be yielded by 294 beegas, 10 biswas of land alleged to have been stripped. The defendant took no exception to the facts as stated in the plaint, and admitted the accuracy of the valuation of the indigo; but pleaded, that the ryots whose crops he had seized, had received advances from himself; and that the seizure was made in satisfaction of the engagements which they had entered into with him; that consequently the ryots alone could question the legality of the seizure, and that he was on no account responsible for it to the plaintiffs. This demurrer was over-ruled by the Zillah Judge, who was of the opinion that the defendant was liable to the plaintiffs for the damages claimed by them.

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1813. opinion that the plaintiffs, being the persons chiefly interested, were entitled to sue for indemnification for loss actually sustained. With a view to ascertain from whom the ryots had received advances, and for what lands (which could only be determined by enquiry on the spot), the Zillah Judge deputed an *aumeen* to enquire into those circumstances, and to ascertain the average produce of each description of land, and the other points forming the basis of the plaintiffs calculation of the damages. The report of the *aumeen* stated that the plaintiffs had produced before him their accounts and the register of those to whom they had given advances, as also the engagements of the ryots: from which it appeared that they had received large advances from the plaintiffs. That he measured the lands alleged to have been stripped, and found that they even exceeded the statement made of them in the plaint, as also did the produce *per beegah*; being frequently forty or fifty bundles, whereas the plaintiff had estimated it at but thirty. That he took the evidence advanced by the plaintiffs to prove that the plant was forcibly cut by the defendant's people, which point he considered as satisfactorily established; and lastly, that he called upon the defendant to produce his papers, in proof of the ryots having taken advances from him, but after repeated calls none were produced. The Zillah Judge considering the plaintiffs case, to be made out from the report of the *aumeen*, called upon the defendant to prove that advances had been made by him. The defendant however rested his case solely on the demurrer regarding the plaintiffs right of action. The Judge, in decreeing the damages, estimated them according to the *aumeen's* report, which made them somewhat above the rate at which the plaintiffs had calculated them. But he made a deduction of 60 rupees a maund from the price of the indigo the land might have yielded, on account of the expences of manufacture, and awarded damages to the amount of 3,019 rupees, 4 anas, 10 gundas.

An appeal being preferred to the Provincial Court by Mr. Rouse, the Second Judge was of opinion that the action of the plaintiffs would lie against the ryots, in case they had failed in the performance of the conditions on which they had received advances; but that the ryots are proprietors of the crops while on the ground, and they only could complain against any illegal seizure; as being the immediate sufferers. He therefore thought that the plaintiffs should be directed to bring their action against the ryots, under the engagements they had taken at the time of making the advances, and that the ryots should be left at liberty to sue for the damages they might have sustained in consequence of the defendant's seizure, but that the present action ought to be dismissed. The Senior Judge was of a contrary opinion, and agreed with the Zillah Judge in thinking, that as the plaintiffs were the sufferers by the act of the defendant, they had a good claim for damages. His opinion therefore being in concurrence with the Zillah decree, it was affirmed with costs. On a further appeal by Mr. Rouse to the Sudder Dewanny Adawlut, it appeared that the engagements entered into by the ryots were to this effect, "that they would deliver the whole produce; and if from inattention, or any other cause, the full produce should be deficient, they should be liable

1813. opinion that the plaintiffs, being the persons chiefly interested, were entitled to sue for indemnification for loss actually sustained. With a view to ascertain from whom the ryots had received advances, and for what lands (which could only be determined by enquiry on the spot), the Zillah Judge deputed an *aumeen* to enquire into those circumstances, and to ascertain the average produce of each description of land, and the other points forming the basis of the plaintiffs calculation of the damages. The report of the *aumeen* stated that the plaintiffs had produced before him their accounts and the register of those to whom they had given advances, as also the engagements of the ryots: from which it appeared that they had received large advances from the plaintiffs. That he measured the lands alleged to have been stripped, and found that they even exceeded the statement made of them in the plaint, as also did the produce *per beegah*; being frequently forty or fifty bundles, whereas the plaintiff had estimated it at but thirty. That he took the evidence advanced by the plaintiffs to prove that the plant was forcibly cut by the defendant's people, which point he considered as satisfactorily established; and lastly, that he called upon the defendant to produce his papers, in proof of the ryots having taken advances from him, but after repeated calls none were produced. The Zillah Judge considering the plaintiffs case, to be made out from the report of the *aumeen*, called upon the defendant to prove that advances had been made by him. The defendant however rested his case solely on the demurrer regarding the plaintiffs right of action. The Judge, in decreeing the damages, estimated them according to the *aumeen's* report, which made them somewhat above the rate at which the plaintiffs had calculated them. But he made a deduction of 60 rupees a maund from the price of the indigo the land might have yielded, on account of the expences of manufacture, and awarded damages to the amount of 3,019 rupees, 4 anas, 10 gundas.

for damages, to be calculated according to the value of indigo yielded by the best description of land." The Court (present J. Fombelle and J. Stuart) in consideration of the nature and extent of the engagement, determined that the plaintiffs had no immediate interest, which could entitle them to damages against a third person for forcible seizure of the indigo plant; that they ought to have come upon the ryots who had entered into this engagement; and that none but the ryots themselves had any right to sue the defendant. The Court therefore were of opinion that the present suit ought to have been dismissed, and accordingly reversed the decision of the inferior Courts. Both parties were however directed to pay their own costs.

1813.

Francis Rouse, v. Alexander Haig and others.

MAHARAJA BISHENATH ROY, Appellant,

versus

KUREEM-OOLAH CHOWDHRY and MOONSHEE
INAYUT OOLAH, Respondents.

1813.

July 21st.

THIS was an action brought by Bishenath Roy, in the Zillah Court of Rajeshahye, on the 19th of December 1806, (and afterwards removed under the provisions of regulation 13, 1808, into the Provincial Court of Moorshedabad), to recover from Kureem-oollah Chowdhry and Moonshee Inayut-oollah, possession of a village called Beree Chupla, the annual produce of which was estimated at 5,001 rupees. It was set forth in the plaint, that, at the sale of certain parts of the zemindaree of the plaintiff, on the 17th of Cheyt 1206, B. S., corresponding with the 18th of March 1800, A. D. in satisfaction of arrears of public revenue, the plaintiff himself purchased the village in dispute, for the sum of 6,050 rupees, in the name and by the agency of his confidential servant Juggenath Roy, whom he furnished with funds for the purpose; that the name of this person was registered in the Collector's office as the real purchaser, but that he executed an *ikrarnameh* or acknowledgment in writing, purporting, that the purchase was made by solely for and on behalf of the plaintiff; that neither he nor his heirs possessed any right or title to the same, and binding himself to perform no act relative thereto, without the concurrence and approval of the plaintiff; that, in the year 1208, the plaintiff had occasion, to repair on business to Calcutta, and during his absence the defendant Kureem-oollah Chowdhry, by the connivance of the other defendant, Moonshee Inayut-oollah, an officer under the Collector, procured the registry of his own name in place of that of Juggenath Roy, by which means he unlawfully obtained, and had since continued in possession of the village, for the recovery of which the present action was brought. The defendant Kureem-oollah Chowdhry denied the purchase of the village by the plaintiff, and contended that it was purchased at auction by Juggenath Roy for himself; that Juggenath being unable to pay the amount of the purchase money, executed to two persons, named Huree Pershad Besee and Bulram Besee, deeds of *bye-bil-wufa* or mort-

A purchases his own lands which were set up to auction for arrears of revenue, by employing a defendant to bid for them. This defendant by authority of A, alienated them to B, of bye bil-wufa or mortgage and conditional sale, which sale became absolute. A, afterwards brings a suit to set aside that sale, on the plea that B had exacted usurious interest on the mortgage.

1813.

money. But the original auction purchase by A, having been in direct violation of the regulations, and A having received more for the lands than he gave for them, even admitting a deduction for the alleged usurious interest, the Court did not judge it necessary to investigate the truth of this allegation, and rejected the claim of A.

gage and conditional sale (redeemable within eight days) of the village in dispute, for a loan of 3,800 rupees; that, with this sum, he paid the amount of the purchase money, and afterwards redeemed the deeds executed to the two persons abovementioned, by borrowing from Radhakishen Ghose the sum of 6,500 rupees, for which he mortgaged the said village, with a condition of eventual sale; that, before the expiration of the stipulated period, he again executed deeds of *bye-bil-wusu* on this village to the defendant Kureem-oollah Chowdhry, for the sum of 7,421 rupees, and discharged his debt to Radha Kishen Ghose; that the period specified in these deeds having expired without the mortgage being redeemed, the sale in consequence became absolute, whereupon he preferred an application to the Collector, from whom he obtained an order for possession, and for the substitution of his name in the office in lieu of that of Juggenath Roy. The other defendant, Moonshee Inayut-oollah, merely denied the allegation of his connivance. The Provincial Court of Moorsshedabad considered, that the plaintiff had failed in proving his purchase, and observed, that, it was extremely improbable he should, from his own funds have purchased the village in dispute, for the alleged price, when it was obvious, that he might have prevented the sale of his lands, by discharging the arrears due on account of them; that doubts existed of the authenticity of the *ikrarnameh* stated by the plaintiff to have been executed to him by Juggenath Roy, from its not having been written on stamp paper, or attested by the signatures of any respectable witnesses; that, admitting the authenticity of that document, the action of the plaintiff (under the condition therein specified) might have been maintained against Juggenath Roy, if it were proved that he sold the village in dispute without the concurrence of the plaintiff, but not against the purchaser from him; that the plaintiff never urged his claim during the life time of Juggenath Roy, but had now instituted a suit after a lapse of a period of four years since the decease of that person; that a proclamation had on the 10th of April 1800, been issued by the Collector of the district, requiring all holders of lands in fictitious names, to attend within three months and register their real names in his office; but that neither the plaintiff himself, nor any one on his behalf, had appeared; that the execution of the mortgage and conditional sale of the village in dispute by Juggenath Roy to the defendant Kureem-oollah Chowdhry, was proved by the authenticated copies of the deeds duly registered at the time of the contract, and produced in evidence by the defendant, and that the defendant's title to possession was also proved by a *purwanna* dated 6th of July 1801, bearing the official signature of the Collector of the district, apprizing the ryots, of the village Boree Chupla having become the property of the defendant Kureem-oollah Chowdhry, and empowering him to collect the rents of the same. On these grounds the Provincial Court dismissed the claim of the plaintiff with costs. On appeal by the plaintiff from the above decision to the Sudder Dewanny Adawlut, he adduced evidence to prove his purchase at auction, and in the course of the trial, admitted that the deeds of mortgage and conditional sale granted by Juggenath Roy, on the village in dispute, for the sum

of 7,421 rupees to the defendants in the name of Kureem-oollah Chowdhry, were executed with his concurrence, but pleaded, that the defendants had, in violation of the regulations, deducted in advance from that sum usurious interest to the amount of 900 rupees. The Court (present J. Fombelle and J. Stuart) on consideration of the evidence brought forward in the case by the appellant, determined, that he had proved his purchase (at auction) of the disputed village, but held, that his title being founded on a direct violation of the regulations, could not be supported. The fourth clause of section 29, regulation 7, 1799, prohibits defaulting landholders, whose lands may be sold by public sale for the discharge of arrears of revenue, from becoming the purchasers, directly or indirectly, of their own lands so disposed of, under penalty of forfeiture to Government. The Court observed, that had the possession of respondents been fraudulent, the estate would have been liable to forfeiture to Government, who might perhaps, on a consideration of any circumstances in favour of the appellant, have been disposed to restore it to him. It had therefore been deemed proper to make the respondent shew his title, in support of which he had set up a *bye-bil-wufa* sale from the agent of the appellant. Such sale was admitted by the appellant, but he pleaded that usurious interest, in opposition to the regulations, had been taken in advance at the time of the sale. On this plea of the appellant, the Court did not consider it necessary to institute an enquiry, which had for its object the exposure of a defect in the title of the respondent, that would not be available to the appellant, although it might render the estate liable to forfeiture, more especially as, after deducting the amount of the alleged usurious interest, the appellant would be found to have received more than he himself paid for the contested village. The decree of the Provincial Court was therefore affirmed by the Sudder Dewanny Adawlut, and the appeal dismissed with costs.

1813.

Maharaja
Bishenath
Roy, v
Kureem-
oollah
Chowdhry
and Moon-
sheeluyut-
oollah.

1813.

SHAM SINGH, Appellant,

versus

July 28th. MUSSUMMAUT UMRAOTEE (on the part of KALEE SUR SINGH, a minor), Respondent.

By the Hindoo law, as current in Mithila (Tirhoot), a father cannot give away the whole ancestral property to one son, to the exclusion of his other sons.

THIS was an action brought by Sham Singh in the Zillah Court of Bhagulpore, on the 11th of August 1804, or the 28th *Sawan* 1213, *Fuslee*, to recover from Mussumaut Umraotee possession of a half share of the talook of Bikrampore Chukramy; of a pergunnah called Chye, and of the mouza of Jypoor Chohur, the annual *jumma* of which was stated at 6,464 rupees. It was set forth in the plaint, that an ancestral estate, comprising the talook of Bikrampore Chukramy and the pergunnah of Chye, had descended by inheritance from Hurhur Singh to his two sons Jograj Singh the father, and Udbhoot Singh the uncle of the plaintiff; that Udbhoot Singh being the elder of the two, his name was according to custom registered in the office of the Collector, but, that they transacted their affairs together, and jointly shared the profits of the estate: That Jograj Singh, having died in the year 1192 *Fuslee*, the plaintiff succeeded in right of his father, to partnership with his uncle Udbhoot Singh; that, during their partnership, his uncle purchased with the profits of the ancestral estate on their joint account, but in his own name, the mouza of Jypoor Chohur and another village; that, in the year 1210 his uncle died, leaving his widow Umraotee and two sons, Kalee Sur Singh, and Zalim Singh; that, in the same year, a proclamation was issued by the Collector of the Zillah of Tirhoot, (in which district the estate was then situated, but from which it had been subsequently separated and annexed to that of Bhagulpore), requiring the attendance of any heir of the late Udbhoot Singh, for the purpose of forming the settlement for the land revenue due on the estate; that, at this time, the plaintiff was precluded by severe illness from hearing of this proclamation; that the defendant Mussumaut Umraotee appeared as heir to Udbhoot Singh, and having procured the settlement of the whole estate to be concluded in her own name, took possession of the same, and wrongfully withheld from him the half share, which he now sued to recover. The defendant Mussumaut Umraotee denied in general terms the truth of the plaintiff's statement, and alleged, that, Hurhur Singh, had a short time before his death, in the year 1182 *Fuslee*, made a gift of the whole of the estate to his eldest son Udbhoot Singh, her late husband, with a stipulation of a pecuniary provision for the younger son Jograj Singh, the father of the plaintiff; that in the following year Udbhoot Singh took possession of the estate, which he continued to enjoy as sole proprietor until the year 1210, the date of his decease, previous to which he bequeathed the estate to his eldest son Kalee Sur Singh, a minor, and provided for the management of it by the defendant, during the period of his minority; that, the plaintiff's father had never enjoyed any share of the estate, in partnership with her late husband; and that the plaintiff had consequently no right to the portion which he claimed.

The pundit of the Zillah Court, to whom the Judge made a reference on the subject of the validity of the gift, alleged by the defendant to have been made by Hurhur Singh, in favour of her deceased husband, declared the gift by a father of the whole of an ancestral immovable estate to one of his sons, to the exclusion of another (where that other was not necessarily disqualified from participation, on account of some defect, natural or incurred), to be illegal; and stated, that sons were entitled to equal participation in an ancestral estate. On the ground of this opinion, and of the evidence adduced by the plaintiff, which proved the purchase of Jypoor Chohur and the other village by Udbhoot Singh, on their joint account, possession of the half share claimed by the plaintiff was decreed to him in the Zillah Court. On appeal by the defendant from the above decision to the Provincial Court of Moorshedabad, that Court having received an opinion from their pundit, declaring the gift whereby Hurhur Singh was stated to have conferred the whole of his ancestral immovable estate on his eldest son Udbhoot Singh to be valid, a judgment was passed, reversing the decree of the Zillah Judge, and adjudging the plaintiff entitled to maintenance only from the defendant. On a further appeal being preferred to the Sudder Dewanny Adawlut by Sham Singh, it appearing that the estate, to the half of which the appellant laid claim, had been generally considered as situated in the province of Mithila, and the parties themselves having, in answer to a question put by the Court, admitted that their religious ceremonies connected with funeral and marriage, and other observances, were governed by the Mithila *shaster*, the opinions of the law officers of this Court, of the Provincial Court of Patna, and of the Zillah Court of Tirhoot, were required as to the legality or otherwise (according to the Mithila *shaster*) of the alleged gift by Hurhur Singh of the whole immovable ancestral estate to his eldest son Udbhoot Singh. The pundits of the Zillah and Provincial Courts differed in opinion with regard to the law in this case, such gift being pronounced invalid, by the pundit of the former Court, and valid by that of the latter. The pundits of this Court being called upon to state, under the Hindoo law, as current in Mithila,

1st. Whether the gift pleaded by the defendant was valid?

2d. Whether such gift would be complete without seizin being given during the life time of the donor? expressed their opinion as follows: 1st, If a Hindoo possessing immovable ancestral property, some time previous to his death, express himself to this effect in talking of his eldest son, "he will become sole proprietor on my death, and my younger son will be provided by him, with a suitable maintenance;" the gift cannot take place, from the omission of the word *dan* (donation) in the expression, which both, according to the *shasters* and the current practice of the country, is essential to complete the gift: further, supposing the word *dan* (donation) to have been expressed in the above sentence, still, the gift cannot be considered valid, because a father and a son possess an equal right in ancestral immovable property; consequently, the younger brother's right is established, and the estate becomes joint property, the gift of which is illegal, and a verbal gift, under any circumstances, of immovable property, unless supported by a *hibbanameh*.

1813.

Sham
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Mussum-
mant Um-
raotee.

1813. is invalid. The authorities agreeably to which this *vyavastha* has been delivered, are the *Vivada retnacara*, *Smriti samoochyu*, *Vivada chundra*, *Vivada chintamuni*, and other works current in Mithila.

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Singh, v.
Mussum-
maut Um-
raotee.

The first authority is the text of *Yajnyawalkya* recorded in the *Vivada retnacara*, *Smriti samoochyu*, and other treatises: "The right of a son, and a grandson, in property acquired by a grandfather, whether landed or other property, is equal."

The second authority is quoted in the *Vivada retnacara*, and is as follows: "The shares of ancestral property, to which a son and a grandson will respectively succeed, are neither greater nor less than each other; the son of the deceased has no option to give it away."

The third authority is the text of *Vrihaspati* cited in the *Vivada retnacara*, *Smriti samoochyu*, *Vivada chundra*, and other authorities, and is as follows: "The right of a son and a grandson in property, whether movable or immovable, acquired by a grandfather, is equal;" and in the *Vivada chundra* it is thus written, "a grandson's right in property acquired by the grandfather is recognized, even, during the life of the son."

The fifth authority is a text of *Vrihaspati*, cited in the *Vivada chintamuni*, *Vivada retnacara*, *Vivada chundra*, and other authorities, to this effect: "There are eight things of which a gift cannot be made, 1st, joint property; 2nd, a son; 3d, a wife; 4th a pledge; 5th, his whole estate; 6th, a deposit; 7th, property borrowed for use; 8th, any thing which he has promised to another."

The sixth authority is cited in the *Vivada chintamuni*; "There is no right over three things, 1st, joint property; 2nd, a son; 3d, a wife; and any gift made of them, is invalid."

The seventh authority is cited in the *Smriti samoochyu* and other books: "A verbal mortgage of immovable property, for a period of ten years, provided it remain in the hands of the mortgagee, is valid: a gift is not valid, unless there be a deed executed between the donor and donee."

The eighth authority is the text of *Marichee* to this effect: "Sale, mortgage, partition, or gift of immovable property is valid, provided there be a deed executed to that effect, in which case all cause of complaint is removed."

2nd, Supposing the donor to have made a gift of the above mentioned property, but not to have given the donee seizin during his life time, the verbal gift is invalid, because the donee has never been in possession of it. This opinion has been delivered agreeably to the *Vivada chintamuni* and other books current in Mithila. The first authority is a text of *Yajnyawalkya*, recorded in the *Vivada chintamuni* and other works, and is as follows: "A deed of gift, unless there should have been seizin of the property, is invalid." The second authority cited in the *Vivada chintamuni* is to this effect: "Even supposing that a *hibbanameli* has been executed, the donee's right to the property is not established, unless he shall have been seized in the same." The third authority is the text of *Nareda*, cited in the *Vivada chintamuni* and other authorities, which is to this effect: "Granting that there be a deed and credible witnesses, no right can thereby be produced, if seizin of the property have not been given."

In conformity to the above exposition of the Hindoo law, final judgment was passed by this Court (present H. Celebrooke and J. Stuart), affirming the decree of the Zillah Judge, and reversing that of the Provincial Court.

JADOO RAM DAS, (Heir of CHINTAMUNEE Das), Appellant, 1813.

versus

OBHYE RAM DAS (Pauper), Respondent.

Aug. 28th.

THIS was an action brought by Obhye Ram Das, *in formâ pauperis*, in the Zillah Court of Midnapore, on the 23d of November 1803, against Biddhadhur Das, and his son Chintamunee Das, to recover possession of a half share of the village of Beetaliya, the *jumma* of which was stated at 1,325 rupees annually; and of certain *dewuttur* lands comprized in the pergunnas of Urooamootha and Shoogamath, the value of which was estimated at 4,590 rupees, 7 anas, 15 gundas, making a total claim of 5,915 rupees, 7 anas, 15 gundas. It was set forth in the plaint, that the plaintiff, Obhye Ram Das, and the defendant Biddhadhur Das were brothers; that, after the death of their father Purbhageer Das in the year 1153 *Umlee*, they were associated, and jointly acquired the lands specified in the claim, by purchase, and in virtue of grants conferred by the zemindars of the pergunnas above mentioned; that these lands stood by mutual consent in the name of Chintamunee Das, the son of Biddhadhur Das; that, in the year 1203 *Umlee*, differences having arisen between the two brothers, the defendant Biddhadhur Das, with his son, separated from the plaintiff, and wrongfully took possession of their joint acquisitions; that the plaintiff sued in the Zillah Court of Midnapore to recover his half share, but that the defendant having given him a written promise, purporting that he was willing to deliver up to the plaintiff the share which he claimed, provided the latter would consent to withdraw the suit then pending, he was induced to file a *razeenameth* or deed of compromise in the case, which was decreed accordingly; that Biddhadhur Das, in violation of the terms of his engagement, had merely assigned to him an insignificant portion of ground, and still retained possession of his share of the contested lands, for the recovery of which the present action was brought. By the defendants, it was contended, that immediately after the decease of Purbhageer Das (which event they alleged to have occurred in the year 1156 *Umlee*), Biddhadhur Das went, with his son Chintamunee Das, to live in the pergunna of Shoogamath, while the plaintiff continued to reside in Urooamootha, where the father of the brothers had died; that Chintamunee Das, when of age, entered the service of Rajah Debindur Narayun Roy, who in the year 1185 *Umlee*, conferred on him 15 batees, 13 beegas, 9 cottahs of *dewuttur* land, comprized in the pergunna of Shoogamath, to enable him to defray the expences attendant on the worship of an idol, which had been erected by him within the limits of the Raja's estate; that, he afterwards obtained, for the same purpose, from the Rancee

The plaintiff sued his brother and nephew, to recover the moiety of an estate, on the plea that it had been acquired while the family was undivided. That plea being established by evidence, judgment was given for the plaintiff. It appearing also that the plaintiff had withdrawn a suit formerly instituted by him for the same property, being induced by a written promise of his brother (defendant) to make an amicable surrender of the moiety sued for; this was construed to be a virtual admission of the plaintiff's

1813. Soogunda, a *lakhiraj* grant of 19 batees of *dewuttur* land, situated in the pergunna of Urooamootha, of which she was the zemindar; that, in the year 1195 *Umlee*, he purchased from Ram Shunker Mujmoodar the village of Beetaliya; that Biddhadhur Das had never executed an acknowledgment of the purport alluded to by the plaintiff, who filed a *razeenameh* in the former action, in consequence of the defendant Biddhadhur Das having agreed to allot him a piece of land sufficient for his maintenance; that, even admitting the execution of such an instrument by him, it could be of no avail in the present case, as the lands, to one half share of which the plaintiff had laid claim, were the exclusive possessions of his son Chintamunee Das, and that the former judgment must bar the present claim. In support of the claim of the plaintiff, the following were the principal documents adduced: A letter from the defendant Biddhadhur Das to the plaintiff Obhye Ram Das, wherein, after reminding him of their near relationship, and recommending an adjustment of family differences, it was observed, that if the plaintiff would consent to relinquish his suit by filing a *razeenameh*, possession should be given to him of the share for which he had brought his action, and that the costs incurred up to that date should be equally defrayed by the parties. An authenticated copy of a *razeenameh* or deed of compromise, executed by Obhye Ram Das, and dated the 21st of November 1797, or 5th *Aghun* 1205, *Umlee*, wherein he stated, that he relinquished the suit instituted by him against the defendant Biddhadhur Das (for the recovery of his share of certain lands), which had been compromised between them; with the order of the Zillah Judge of the same date, directing the suit to be struck off the file, and making the costs actually incurred, payable by the parties respectively. Six *sunnuds*, in the Ooriya language, of various dates, empowering the defendants Biddhadhur Das and Chintamunee Das to hold certain lands on a free tenure, under *lakhiraj* grants of *dewuttur*, bearing the seal of Raja Debindur Narayun Roy and of his father Muhindur Narayun Roy; also the seals of the *canoongoes* of the pergunna, an engagement executed by Ram Shunker Mujmoodar in favour of Chintamunee Das, dated 25th *Phalgun* 1194, *Umlee*, setting forth, that he had pledged to Chintamunee Das the village of Beetaliya for a loan of 701 rupees, negotiated by Obhye Ram Das at the rate of 24 per cent interest, which amount, principal and interest, he bound himself to discharge on or before the 25th *Bladoon*, and, in the event of his failing so to do, that Chintamunee should enjoy the usufruct of the said village until he should have reimbursed himself with the assets arising therefrom. Two receipts signed by Ram Shunker Mujmoodar for the above mentioned sum, therein stated to have been borrowed from Chintamunee Das by means of Obhye Ram Das; one for 400 sicca rupees, dated 25th *Phalgun* 1194, *Umlee*; the other for 301 sicca rupees, dated the 9th *Chey*t 1199. The defendant, after denying that the letter alleged by the plaintiff to have been written by him was genuine, adduced a *purwanna*, signed C. Burrowes, acting Collector of Midnapore, and dated the 26th of May 1788, or 18th *Jeth* 1195, *Umlee*, addressed to the *Amil*, *Chowdhrys*, *Canoongoes*, and others, of pergunna Bhoonyamootha,

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informing them that Chintamunee had obtained temporary possession of the village Beetaliya, agreeably to the terms of an engagement executed by Ram Shunkur Mujmoodar in his favour. He further adduced a *qibala* or bill of sale, executed by Ram Shunkur Mujmoodar on the 7th *Bhadoo* 1196, *Fuslee*, and bearing the seal of the cutcherry of the Zillah, reciting, that as he was unable to discharge the arrears of revenue due from him, he had agreed to sell the village of Beetaliya to Chintamunee Das for 3,429 *rupees*, which sum he in the same instrument acknowledged to have received. The parties named several witnesses to prove the truth of their respective allegations. After a consideration of the evidence adduced on both sides, the Judge of the Zillah Court considering it established by the testimony of the witnesses for the plaintiff, that the letter, in consequence of which the *razeenamah* was executed, was in the hand writing of the defendant Biddhadhur Das; being of opinion that that document amounted virtually to a recognition of the plaintiff's right, and considering, that the fact of the parties having lived in partnership from the time of the decease of Purbhageer Das, until the year 1203 *Umlee*, had been fully established, determined that the plaintiff was entitled to a half share of the lands in dispute, and accordingly gave judgment in his favour, with costs against the defendant. On an appeal by the defendant Chintamunee Das (Biddhadhur Das having died shortly after the date of the Zillah decree) from the above decision to the Provincial Court of Calcutta, that Court concurred in it, and dismissed the appeal with costs. On an appeal by Jadoo Ram Das (the brother and heir of Chintamunee Das who died while the suit was pending in the Provincial Court) from the above decision, the Sudder Dewanny Adawlut (present H. T. Colebrooke and J. Fombelle) concurred in the judgment passed in favour of the claim, which was therefore finally confirmed with costs against the appellant.

1813.

Jadoo Ram
Das, v.
Obhye Ram
Das.

1813.

RADHAMOHUN GHOSE, Appell int.

versus

Sept. 1st.

BHURUT CHUND GHOSE, Respondent.

THIS was an action brought by Radhamohun Ghose on the 31st of July 1799, in the Zillah Court of Jessore, against Bhurut Chund Ghose, to recover the sum of 400 rupees, stated to be due as arrears of rent for the Bengal year 1203, on 401 beegabs of land situated in the mouza of Pereekhalce. It was set forth in the plaint, that the mouza in question consisted of waste and jungle lands, comprized in the pergunna of Hooglee, an estate purchased in the Bengal year 1201 by the plaintiff; that 401 beegabs of these lands were in the same year granted on a lease to the defendant, who continued to cultivate them until the Bengal year 1203; that he now refused to discharge the arrears of rent due thereon for the above year, and resisted the measurement of his lands, and the payment of rent for the same, at the usual rate of rent for similar tenures in the pergunna; wherefore the present action had been brought. By the defendant it was contended, that the mouza in question was in the Bengal year 1199, purchased in his name as a separate talook, at a fixed *jumma*, by his father, jointly with his uncles, from the former zemindar, for the sum of 601 rupees; that, at the time of the purchase, the lands having long lain waste and uncultivated, it was stipulated that no revenue should be demanded from them for a period of two years, at the expiration of which time the rate of *jumma* was declared liable for three years to a *rusud* or gradual increase, and afterwards to remain fixed at 57 rupees annually. That the talook in consequence was not at the time declared separated from the zemindaree, but that a formal application having in the year 1205 B. S. been made by the defendant to the Collector for that purpose, the separation of it was declared accordingly; that the plaintiff was not authorized under the regulations to compel him (the defendant) to submit to a measurement of those lands, or to pay rent at the customary rate of the pergunnah; that the amount of rent due on the lands in dispute for the year 1203, had been paid to the *moh* of the plaintiff, who had evaded granting a receipt for the same. In support of his allegations, the following documents were brought forward by the defendant. A *qibala* or bill of sale, executed by Luchmee Nurayun Roy and others, the former zemindars of pergunnah Hooglee, in favour of Bhurut Chund Ghose the defendant, reciting, that the mouza of Pereekhalce had been sold to him for the sum of 601 rupees; that it was to be registered as a separate talook in the name of the defendant Bhurut Chund Ghose and separated from their zemindaree; that the rate of *jumma* was fixed at 57 rupees, but that no rent would be exacted thereon for a period of two years, after which a fourth of that sum would be demandable in the year 1203, half in 1204, three-fourths in 1205, and the whole amount in 1206. This *qibala* was dated the 4th *Asarh* 1199, was attested by witnesses, and bore the official seal and signature of A. Hesilridge, Collector. A *talood* or lease for the mouza of Pereekhalce, the *jumma* of which was declared to

In a suit by a zameendar against a talookdar to recover arrears of rent, the latter pleads an engagement contracted by him with the former proprietor, authorizing him to hold his lands as an independent tenure at a fixed rent. Plaintiff purchased the zameendaree, partly by private contract and partly at a public sale for discharge of arrears of revenue. Decreed, in conformity with the provisions of regulation 44, 1793, that defendant's engagement as far as regards the fixed rent of that part of his talook included in the public purchase of the plaintiff, is null and void; but the terms of the engage-

be fixed in conformity with the orders of the Board of Revenue, 1813. dated the 16th of June 1801, at 59 rupees, 6 anas, 4 gundas, 2 cowries, bearing the official seal and signature of the Collector, and dated the 6th of July 1801. A *purwanna* of the same date issued by the Collector to the plaintiff Radha Mohun Ghose, informing him that the mouza of Pereekhalee, the *jumma* of which was declared fixed as above, had been registered as an independent talook in the name of the defendant, who was empowered to pay the amount of his revenue, direct into the Collector's office. The plaintiff brought forward *wasil baqee* accounts for the years 1200, and 1201, to prove that the mouza in question was at that time held *khas*, or under the immediate management of the officers of Government, and adduced in support of his purchase of the zemindary, 1st, a *byenameli*, bearing the official seal and signature of the Collector of the zillah, and dated the 27th of December 1794, A. D. or 15th *Poos* 1201, B. S., from which it appeared, that the plaintiff had on the 20th of December 1794, purchased at public auction an eight ana share of pergunnah Hooglee, sold in satisfaction of arrears of public revenue; 2nd, a *qibala*, executed by Byjnath Roy and others, zemindars, in favour of the plaintiff Radah Mohun Ghose, duly registered, reciting that they had sold to him, for the sum of 601 rupees, the remaining eight ana share of the pergunnah abovenamed. After considering the evidence adduced by the defendant, the Judge of the Zillah Court determined, that the due execution of the *qibala* by the former zemindar to the defendant, and the payment by the latter of the amount of rent due on the mouza of Pereekhalee, for the year 1203, to the *naib* of the plaintiff, were proved by the testimony of the witnesses examined; that the fact of the separation of the talook of the defendant from the zemindary of the plaintiff, was sufficiently established, by a perusal of the contents of the *purwanna* issued by the Collector to the plaintiff, on the 6th of July 1801; that the plaintiff had not attempted to prove that the *qibala* adduced by the defendant had been collusively or fraudulently obtained by him; and that the validity of this instrument was not affected by the circumstance of the lands in question appearing as *khas* in the zemindary accounts for the Bengal years 1200 and 1201, produced by the plaintiff, it being distinctly specified in the *qibala* abovementioned, that no rent would be demanded for those years on the mouza in dispute. On the above grounds, it being the opinion of the Zillah Judge that the action of the plaintiff could not be maintained, judgment accordingly went against him with costs. On appeal by the plaintiff from the above decision to the Provincial Court of Calcutta, that Court concurred in it, and dismissed the appeal with costs. The appellant having petitioned for a special appeal to the Sudder Dewanny Adawlut against the above decree, the appeal was allowed: it appearing doubtful to this Court, whether it was not the intention of the parties to the sale of the share of the mouza in dispute, relative to which the *qibala* had been executed, that it should be considered as only separated *pro tempore* from the zemindary; and that the revenue assessable thereon, after clearing away the jungle, should be paid direct to the zemindary.

1813. dar. The appeal having been accordingly heard, the reasons which guided the decision of the Sudder Dewanny Adawlut were as follow : It appeared that a five ana share of pergunnah Hooglee the estate of Luchmee Nurayun Roy, the former zemindar, was on the 13th *Cartick* 1201, sold at auction for recovery of arrears of public revenue, and purchased by one Ram Chunder Roy ; that the appellant, on the 15th *Poos* of the same year, purchased an eight ana share of the aforesaid pergunnah, sold also in satisfaction of arrears of revenue ; that he afterwards purchased from Ram Chunder Roy the five ana share above alluded to, and the remaining three ana share of the estate from Bijnath Roy, the then zemindar ; that it clearly appeared from an attentive examination of the contents of the *qibala* brought forward in the Zillah Court by the respondent, to have been the intention of the zemindar, and so understood at the time by the respondent, that the contested mouza sold was to continue a dependent *talookdary* ; that as the appellant was himself the purchaser at auction of an eight ana share of the whole estate sold in satisfaction of arrears of public revenue, and had afterwards bought a five ana share from the purchaser at auction of the same, the rate of *jumma* specified in the *qibala* as assessable on the share of the mouza in dispute was, in conformity with section 5, regulation 44, 1793, as far as respected a 13 ana share of the zemindary, null and void. That this rate would, however, hold good for a period of ten years, according to the rule contained in section 4, of the regulation above quoted, with regard to the remaining 3 ana share included in the private purchase by the appellant from Bijnath Roy. A final order was accordingly passed by the Sudder Dewanny Adawlut (present J. Fombelle and J. Stuart), reversing the decree of the Provincial Court. It was directed, that the talook in dispute should be re-annexed to the zemindary, that the fixed assessment thereon should no longer be payable directly to Government, and that the respondent should, as dependant talookdar, pay rent to the appellant, at the customary rate of rent for *jungleboory* land in the pergunnah. The appellant was declared entitled to recover from the respondent the arrears of rent due on the proportion of the mouza in dispute, situated within the 13 ana share, from the year 1203, until the date of the decree of this Court, according to the abovementioned rate, and on the proportion contained in the remaining 3 ana share at the rate specified in the *qibala*, for a period of ten years from the date of the execution thereof, and afterwards at the usual rate of rent for a similar description of land in the pergunnah. It was further ordered, that unless the parties should come to an agreement between themselves, with respect to the annual rent demandable by the appellant, and the rate at which the arrears of the period specified in the claim of the appellant should be adjusted, the Zillah Judge should depute an *ameen* to the spot for the purpose of adjusting the dispute, in conformity with the above principles and arrangements. The costs in each of the Courts were made payable by the respective parties.

Radhamo-
hun Ghose,
v. Bhurut
Chund
Ghose.

RAM JEWUN MISR, (Pauper) Appellant,

1813.

versus

GUOREE SINGH, Respondent.

Sept. 6th.

THIS was an action brought by Ram Jewun Misr (*in formd pau-* Claim to
peris) in the Zillah Court of Sarun, on the 17th of August 1804, or lands
 26th *Sawun* 1211, *Fuslee*, against Guoree Singh, to recover pos- granted in
 session of 100 beegas of rent free land, situated at mouza Busha in commuta-
 pergunna Murhul. The annual produce was estimated at 100 yearly pen-
 rupees. It was set forth in the plaint, that a pension of 360 sion, under
 rupees *per annum*, was in the *Fuslee* year 1170, or 1763, A. D. *sumud* executed
 settled upon the ancestor of the plaintiff (Huree Purshad Misr,) subsequently
 by Rai Ramnidhi, *aumal* of pergunna Murhul; that the allowance to the
 for that year was paid by the zemindars of pergunna Data acquisition
 Roy, and Jypal Roy, who in the *Fuslee* year 1171, or 1764, A. D. of the
 commuted 150 rupees of it for 150 beegas of *nankar* land, and in dewanny.
 1186 or 1779, A. D. executed a *sunnud* confirmatory of the com- Claim dis-
 mutation; that, after the conclusion of the decennial settle- missed by the
 the plaintiff was wrongfully dispossessed by Jypal Roy and by the Provin-
 defendant, son of Data-Roy, on the plea, that the assessment had cial Court;
 been formed on the whole assets of their lands, including those but it ap-
 which had been assigned to the plaintiff in commutation of the pen- pearing
 sion, as abovementioned; that he brought an action in the Zillah that the
 Court for recovery of possession, and obtained a decree in his pension in
 favour, by virtue of which he was reinstated, and had continued lieu of
 in possession until the year 1203 *Fuslee*, or 1795, A. D. when the which the
 defendant dispossessed him of the quantity of land specified in grant of
 the claim, for the recovery of which the present action was brought land was
 The defendant denied all knowledge of a *sunnud* of the purport made had
 alluded to in the plaint. He admitted that the ancestor of the been grant-
 plaintiff had received a certain allowance from his predecessor, ed before
 who obtained credit for the amount so granted in the revenue Com- the Com-
 accounts for the pergunnah abovenamed; but contended, however, pany's ac-
 that the ancestor of the plaintiff had, until the year 1196 *Fuslee*, or cession to
 1789, A. D. held 100 beegas of land subject to an annual rent of the dewanny,
 26 rupees; and that, after the decennial settlement, he entered the claimant
 into engagements and had regularly paid rent for the same was refer-
 It was added, that after the decree for restitution of possession ed by that
 awarded to the plaintiff, when the defendant was about to institute Court to the
 a suit for the purpose of trying his right to the land in question, Collector,
 the grandfather of the plaintiff, together with the plaintiff, ex- who re-
 ecuted an agreement, reciting, that they were willing to receive 15 jected his
 beegas of *birt*, or charity lands, and to relinquish all claim to the claim under
 contested land. A *sunnud*, dated 15th *Sawun* 1186. *Fuslee*, or the provi-
 1779, A. D. was produced by the plaintiff, in which 100 beegas sions of
 land in mouza Busha were alleged to have been granted to Huree sec. 3, reg.
 Purshad Misr by Data Roy, in lieu of 100 rupees *nankar*, for 24, 1793.
 which sum it was stated he was to receive credit in the amount of On appeal
 revenue payable to Government. The defendant brought forward to the
 a *baznameh* or deed of relinquishment, dated 15th *Kartick* 1201 Sudder
 or 1793, A. D. purporting to have been executed by the plaintiff Dewanny
 and his grandfather Ram Dutt Misr, whereby they consented to Adawlut
 relinquish all claim to *nankar* in Busha, on consideration of re- the Court
 affirmed
 the deci-
 sion against
 the claim-
 ant.

1813. **Ram Jewun Misr, v. Guoree Singh.** ceiving 15 beegas of *birt* land in the same mouza. Witnesses for the plaintiff deposed to the contested lands having been allowed to the ancestor of the plaintiff in lieu of *nankar*, and to the possession by the plaintiff and his ancestors until the year 1203 *Fuslee*, or 1795, A. D. From their testimony also it appeared that Ram Dutt Misr had died in 1200 *Fuslee*, or 1792, A. D. a year previous to the alleged date of the *buznameh*, which document was therefore rejected as invalid by the Zillah Judge, who considered the plaintiff entitled to the lands for the recovery of which he had sued, and accordingly gave judgment in his favour, with costs against the defendant. On appeal by the defendant from the above decree to the Provincial Court of Patna, the following were the grounds on which that Court did not concur in the decision; 1st, the Court considered, that the *sunnud* dated 1186 *Fuslee*, or 1779, A. D., under which the plaintiff claimed, was invalid, by section 3, regulation 19, 1793, declaring all grants (for holding land exempt from the public assessment) made without the sanction of Government, since the date of the dewanny, August 1765, to be invalid; 2d, from a report furnished by the Collector of the district, in answer to a precept of the Court, it appeared, that in the year 1196 *Fuslee*, or 1789, A. D. the *jumma* of the lands of the appellant was rated at 1,107 rupees, 13 anas, 5 gundas, that in the year 1197 *Fuslee*, or 1790, A. D. (the date of the decennial settlement), they were assessed with an increase of 204 rupees, 2 anas, 6 gundas, and although it did not appear how this increase had been computed, yet the Court were of opinion that it must have been grounded on the *hal hasl* or gross annual produce of the lands; 3d, the Court considered, that (under the rule contained in section 34, regulation 8, 1793, directing that the allowances of the *cazees* and *canoongoes* heretofore paid by the landholders, as well as any public pensions hitherto paid through them, are to be added to the amount of the *jumma*, and in future paid by the Collectors of the revenue in the several zillahs on the part of Government) the payment of any allowance which the respondent's ancestor had before received from the predecessor of the appellant, rested after the conclusion of the decennial settlement with Government, and that any subsequent grant empowering the grantee to hold land exempt from the payment of revenue in lieu of such allowance was inadmissible. The Provincial Court therefore reversed the decree passed by the Zillah Judge, making the costs in both Courts payable by the respondent: the Court, however, advised the respondent to prefer any claim he might have, for the continuance of the pension, to which he considered himself entitled, to Government, through the Collector of the district, according to the rule laid down in section 5, regulation 24, 1793. The respondent accordingly presented a petition to the Collector; but not being able to produce any *sunnud* of confirmation from the office established for the investigation of pensions, or any judgment authorizing the payment of the pension which he claimed, the provisions of regulation 24, 1793, which authorize in certain cases the continuance of pensions, were not considered applicable to his case, and his claim was rejected under the provisions of section 3, regulation 24, 1793,

which declares that no pension received without a *sunnud*, or under *sunnuds* granted since the Company obtained the dewanny, without the sanction of Government, shall be continued, unless the persons receiving the pension be real objects of charity, or unless they received them before the commencement of the Bengal *Fuslee* year 1199, or 1772, A. D. in Bengal, Behar and Orissa respectively, and have since continued to receive them; in which case the pensions heretofore received are to be continued during the lives of the present pensioners. The respondent petitioned for a special appeal to the Sudder Dewanny Adawlut against the decree of the Provincial Court, alleging that the rule contained in section 34, regulation 8, 1793, quoted by the Provincial Court, was irrelevant, as the original grant, under which he claimed, was executed to him in the year 1171 *Fuslee*, or 1764, A. D. before the Company's acquisition of the dewanny. That by virtue of this document, his ancestors and himself had held possession until the year 1186 *Fuslee*, or 1779, A. D. and that he obtained the *sunnud* of the last named date (confirming the prior grant) in consequence of a partition by the zemindars of the estate in which the lands in dispute were situated. The appeal having been admitted and heard, this Court (present H. Colebrooke) concurred in the decision of the Provincial Court, which was therefore affirmed and the appeal dismissed, with costs recoverable from the appellant in the event of property being hereafter found in his possession.

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Ram Jewun
Mist, v.
Guoree
Singh.

UDAN SINGH, and RUOSHUN ALI, Appellants,

1813.

versus

MUNERI KHAN, OMRAO SINGH, (Brother and Heir to
DURYAO SINGH), and MEER NUJEEBOOLLA,
Respondents.

Sept. 15th.

THIS was an action brought by Muneri Khan and Omrao Singh, If A, a in the City Court of Patna on the 23d of May 1804, or the 29th *Bysack* 1211, *Fuslee*, against Uodan Singh, Ruoshun Ali and Meer Nujeeboolla, to recover from the two former the mouza Ukburpoor chutna, situated in pergunna Phoolwaree; also the sum of 325 rupees as the produce of the lands claimed, during the *Fuslee* years 1209, 1210, 1211. It was stated in the plaint, that Muneri Khan and Duryao Singh purchased conjointly in the *Fuslee* year 1208, the *mokurrerec* right of mouza Ukburpoor Chutna for the sum of 350 rupees, from Meer Nujeeboolla the *mokurrereedar* thereof, who executed to them a *qibala* or bill of sale, and signed a *qubzoolwusool*, or document acknowledging the receipt of the purchase money; that, on presenting these deeds for the purpose of being duly registered, a petition was preferred to the Register by the defendants, Uodan Singh and Ruoshun Ali, setting forth, that they were joint proprietors of the lands sold, and as such entitled to them by *Shoofa*, or the right of pre-emption, at the price stipulated with the plaintiffs; that the Register, on the ground of this allegation, passed an

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1813. order annulling the sale executed in favour of the plaintiffs by Meer Nujeeboolla, and directing that person to draw out fresh deeds at the price agreed on with the plaintiffs, in the names of the defendants, who thereby became possessed of the lands, for the recovery of which with the profits accrued thereon during the abovementioned *Fuslee* years, the present action was brought. The defendants, Uodan Singh and Ruoshun Ali, rested their defence on their right of pre-emption of the *mokurreree* of the mouza in dispute, as proprietors of a 12 ana share of the pergunna, and partners in the property of the remaining portion thereof; on the fact of their having claimed their right of pre-emption when the bill of sale in favour of the plaintiffs was presented for registry, which was the first intimation they received of the transaction; and on the order passed accordingly by the Register in their favour. The other defendant (Meer Nujeeboolla), did not appear. The documents brought forward by the plaintiffs were, 1st, a *qibala*, or bill of sale, executed by Meer Nujeeboolla, reciting, that he had sold to Muneri Khan and Duryao Singh the *mokurreree* right of mouza Ukburpoor Chutna for the sum of 350 sicca rupees, bearing the official seal of the *cazee* of the City Court of Patna and dated the 1st *Suffur* 1216 *Hijree*, or 13th of June 1801; 2d, a *qubzoolwusool* signed by Meer Nujeeboolla acknowledging the receipt of the above sum dated and sealed as before. The defendants, Uodan Singh and Ruoshun Ali, produced an authenticated copy of an order by the Register of the City Court of Patna, annulling the sale executed by Meer Nujeeboolla to the plaintiffs, and directing other deeds to be drawn out at the price agreed on with the plaintiffs in favour of the two abovenamed defendants, therein declared entitled to the right of *Shoofa*, or pre-emption. The Judge of the City Court (after observing that the order passed by the Register was wholly illegal, as the question of the validity of the prior sale made in favour of the plaintiffs was not judicially before him), determined, on a consideration of the evidence adduced by the defendants, which established their joint proprietary right in the lands sold, that the first sale was invalid; and that the claim of the plaintiffs, as far as related to their right to purchase the *mokurreree* of the village in dispute, was inadmissible. Witnesses for the plaintiffs having proved their payment to Meer Nujeeboolla of the sum of 350 rupees, judgment was passed in their favour for recovering this amount, with interest, from that defendant, who was ordered to defray the costs incurred by the parties respectively. On appeal by the plaintiff from the above decision to the Provincial Court of Patna, the defendants, Uodan Singh and Ruoshun Ali, brought forward two documents, 1st, a bill of sale for the *mokurreree* right of Ukburpoor Chutna, 2d, a *qubzoolwusool* of the same tenor as those produced in the City Court by the plaintiffs, and purporting to have been executed to them by Meer Nujeeboolla on the 9th *Rabeeoolwusool* 1216, or 21st of July 1801, A. D. and bearing the official seal and signature of the Register of the City Court of Patna; 3d, an *uml dustuk*, or order for possession, from the Collector, under date the 5th of November 1801, or 15th *Kartick* 1204, *Fuslee*. Meer Nujeeboolla having attended and pleaded as one of the respon-

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dents in the cause, admitted the execution of the deeds in favour of Muneri Khan, and Duryao Sing; but denied all knowledge of the subsequent sale alleged by Uodan Singh, and Ruoshun Ali, or having received from them any sum of money whatever. The Provincial Court agreed in opinion with the City Judge, as to the illegality of the order passed by the Register, but did not concur in the decree, for the following reasons, 1st, the Court was of opinion, that admitting the instruments brought forward by the parties to be genuine, the deeds executed to the plaintiffs on the 13th of June 1801, by Meer Nujeeboolla, would be entitled to be upheld in preference to documents subsequently drawn out in favour of the defendants on the 21st of July 1801. From the evidence brought forward in the case, the Court considered it to be proved, that the sale of the contested mouza was concluded with the plaintiffs on the refusal of Uodan Singh and Ruoshun Ali to avail themselves of an option of the purchase given to them as joint proprietors in the first instance by Meer Nujeeboolla; 3d, the Court was of opinion, that the assertion of Meer Nujeeboolla respecting the non-receipt by him of any money from the defendants, was corroborated by the testimony of the treasurer of the City Court, who deposed to his having delivered, by order of the Register, the sum of 350 rupees, a deposit made by Uodan Singh and Ruoshun Ali, to two persons named Uchumbut Lal and Sumbhoo Nath, who had been in the employ of Meer Nujeeboolla. From the statement of Meer Nujeeboolla, it appeared, that shortly after he had executed the deeds to the plaintiffs he quitted Patna, entrusting the charge of having them duly registered to Uchumbut Lal his agent; that during his absence he received a letter from that person, reciting that obstacles had occurred to the registry of the documents, and requesting to be furnished with blank papers with his seal and signature affixed (to enable him to prepare the requisite statements for removing the difficulty which had arisen), which were accordingly sent. The Court, on these grounds, saw strong reasons for suspecting that two of the above papers were filled up by Uchumbut Lal (without the knowledge or authority of Meer Nujeeboolla) in collusion with Uodan Singh and Ruoshun Ali; and the Court deemed it probable that the order for annulling the sale executed in favour of the plaintiffs had been unduly obtained from the Register. The decree passed against the claim by the City Judge was therefore reversed by the Provincial Court, and the costs of suit were declared payable by Uodan Singh and Ruoshun Ali, who were left at liberty to sue Uchumbut Lal (Sumbhoonath having demised) for the recovery of the money paid on their account to those persons. Uodan Singh and Ruoshun Ali being dissatisfied with the above decision, petitioned the Sudder Dewanny Adawlut for a special appeal, which was not allowed. A petition was however presented to the Board of Revenue by the abovenamed persons, stating, that they were the actual proprietors of a twelve ana share of the pergunna containing the mouza in dispute, and joint sharers in the remaining four anas; that they had granted a *mokurreree* lease of it to Burkutoollah, the father of Nujeeboollah, who had no right by inheritance to succeed to the same tenure, for, that in section 16,

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Uodan
Singh, and
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neri Khan
Omrao
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1813. regulation 8, 1793, it is expressly declared, that after the death of persons to whom *mokurreree* leases have been granted, the settlement is to be made with the actual proprietors of the soil, and that, independently therefore of their right of pre-emption as proprietors, they had a right under the regulation above quoted, to have the settlement made directly with them. The Board of Revenue admitted the justice of the claim of the petitioners, but observed, that their right must be enforced by a decree of Court, and recommended them therefore either to try their right on the ground stated in their petition, by instituting a new suit, or to renew their application to the Sudder Dewanny Adawlut for the admission of a special appeal. The Court of Sudder Dewanny Adawlut, after an inspection of the petition presented to the Board of Revenue, and the order passed upon it by that Board, admitted a special appeal, and proceeded to try the merits of the case on the ground originally rested upon by the appellants, namely their right of pre-emption. In order to determine the question of law, as connected with the circumstances of the case, a reference was made by the Sudder Dewanny Adawlut to their Moolhumudan law officers, who delivered an opinion as follows: Meer Nujeeboollah has sold the *mechals* in dispute to Muneri Khan and Omrao Singh, respondents, conceiving himself entitled to do so, as heir of his father the former *mokurrereedar*; the appellants (late *maliks*) claim a title thereto under a right of pre-emption, declaring at the same time, that the estate of a *mokurrereedar* upon his demise devolves on his heir. As, by the settlement concluded between Government and the *mokurrereedar* he becomes *malik* of the proceeds of his *mokurreree*, with the exception of a portion thereof, which the late *malik* receives as *malikaneh*; consequently the right of the late *malik* in such lands, is not wholly transferred to the *mokurrereedar*, but he and the late *malik* are to each other in the relation of partners, and the right of *shoofa* appertains to one partner over the share of the other partner, because, such property is joint and undivided, and he is a sharer in the thing itself. The appellants, who are late *maliks*, on these grounds, claim a title of pre-emption to the *mokurreree* lands sold by Nujeeboollah to Muneri Khan and Omrao Singh, and they are legally entitled to purchase them at the price given for them, by the respondents. On a consideration of this opinion and of its having been satisfactorily proved that the money paid by the appellants to Uchumbut Lal was received by Meer Nujeeboollah, and that this person offered after the conclusion of the second sale to return the amount of the purchase money received from the other two respondents, by whom this offer was refused: final judgment was passed by this Court (present J. Fombelle and J. Stuart) in favour of the claim of the appellants, with costs in the three Courts, rendered payable by the respondents. It was further directed, that the profits realized from the lands, by the respondents Muneri Khan and Omrao Singh, during the time they had been in possession, should, after deducting the amount of revenue paid to Government, and the expences of collection, be refunded, without interest, to the appellants: and that Meer Nujeeboollah should repay, without interest, the amount of the pur-

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chase money paid to him by the two respondents abovementioned. As it appeared that, besides the appellants, there were other sharers in the mouza in dispute who had not sued, it was at the same time intimated that the final decree in this case would be no bar to such persons hereafter preferring any claims they might have to the right of pre-emption.

SUROOPCHUND DAS, Appellant.

1813.

versus

HENRY MASSEYK, Respondent.

Oct. 26th.

THIS was an action for breach of engagement, brought by Mr A, executed an engagement to B, under-
Henry Masseyk in the City Court of Moorshedabad, on the 24th of May 1807, to recover from Suroopchund Das, the sum of 22,410 rupees. The plaintiff, who was a merchant at Jungy- taking to
pore, stated, that Suroopchund Das, a dealer in silk, on the 7th of furnish 250
January 1807, or 25th Poos 1213, B. S. entered into a written en- maunds of
gagement with him, agreeing to furnish 250 maunds of silk, at
first and second sort, at the rate of 7 rupees, 12 anas per seer, periods,
(according to musters then exhibited and approved) deliverable in, and in cer-
certain quantities, and at stated periods, in consideration of receiv- tain quan-
ing advances from time to time for that purpose; the deliveries, ties, on
to be completed by the end of the month *Phalgun*, and the defend- considera-
ant rendering himself liable in the event of the non-fulfilment of the tion of re-
terms of his engagement, to a penalty of one rupee for every seer of ceiving ad-
silk remaining undelivered. That he (the plaintiff) made an advance vances
of the sum of 38,317 rupees, for the first delivery (which delivery by from time
the terms of the contract, was to amount to 125 maunds) to the defen- to time;
dant, and bound himself not to receive silk from any other person, by the whole
during the period specified in the engagement; that, relying on before a
the punctual discharge of the obligation, by the defendant, he specified quantity to
himself entered into engagements with the mercantile house of day, or on
Downe and Co. in Calcutta, to whom he agreed to furnish, by a failure
certain time, 250 maunds of silk, at the rate of 8 rupees, 12 anas thereof
per seer, of the same quality as that for which he had contracted himself to subjecting
with the defendant; that the defendant delivered in about 25 a penalty
maunds of silk of the first and second sort, corresponding with the of one
musters, after which he disappeared, and remained unheard of for rupee for
a considerable time; that he returned after the expiration of the of silk re-
period specified in the engagement, bringing with him a quantity maining
of silk, of the third sort, which he offered for the purpose of com- undeliver-
pleting his first delivery to the plaintiff, by whom the same was at ed. B had
first rejected; that the defendant having however consented to a made one
deduction of 5½ anas, in the price of each seer of the third sort of advance
silk, leaving the plaintiff at liberty to take or to reject on those only, and
terms, as much of it as he pleased, and having also signed an engage- A failed in
ment undertaking that he would within fifteen days perform of his con-
the condition of his obligation, the plaintiff consented to receive tract.
about fifty-one maunds of the silk of the third sort, and rejected On a suit
the remainder; that the defendant had neither fulfilled his by B, a-
engagement, nor taken back the silk, which had been rejected. gainst A,
to recover

1813. That, after deducting the sum of 22,865 rupees, the value of silk acknowledged to have been received, there remained due of the first advance, a balance of 15,452 rupees, which, together with the sum of 6,958 rupees (to which the plaintiff considered himself entitled, under the penalty to which the defendant had rendered himself liable by the terms of his original contract) formed the amount specified in the claim, for the recovery of which the present action was brought. The defendant after demurring to the declaration as insufficient to maintain the action; he having executed the engagement jointly in the name of Mr. H. Masseyk and the Honourable A. Ramsay, pleaded generally fulfilment of that part of his contract, on account of which he had received advances. The former plea was however over-ruled, and he could adduce no evidence in support of the latter: in support of the claim of the plaintiff, the following documents were adduced; 1st, an engagement executed by the defendant (on the 25th *Poos* 1213) in the joint names of the plaintiff and Mr. Ramsay, undertaking, in consideration of receiving certain advances, to deliver, in different quantities, and stated periods, 250 maunds of silk of the first and second sort; to complete his deliveries by the 21st of *Phalgun* of the same year, and subjecting himself, in case of a breach of his engagement, to a penalty of one rupee for every seer of silk not delivered. 2d, A letter from Mr. Downie, dated 14th of January 1807, acknowledging the receipt of one from the plaintiff, transmitting musters of silk, and authorizing the plaintiff, on certain conditions, to proceed in his speculation, and to draw on the house by instalments, for the sum of 97,000 sicca rupees. 3d, Engagement executed on the 24th *Phalgun* 1213, by a person named Loknath, on the part of the defendant, reciting, that the period for the delivery of the silk having expired, the defendant agreed to allow a deduction of $5\frac{1}{2}$ anas, in the price of each seer of silk of the third sort, which might be approved by the plaintiff; to receive back the remainder as rejected, and to comply with the terms of his original engagement, within 15 days from the above date. 4th, Two letters from the defendant to the plaintiff wherein, after expressing his regret at having entered into an engagement with the terms of which he found himself unable to comply, he proceeds to state, that he has appointed Loknath his agent for the purpose of adjusting his accounts and of receiving back such quantity of silk of the third sort, as might be rejected by the plaintiff. 5th, A letter from Unoopchund Das, the brother of Suroopchund (the defendant), to Kurreetchund Das, dewan of the Jungypore factory, mentioning the failure by his brother in the performance of his engagement with Mr. Masseyk, and requesting him to become security for the repayment to that gentleman of the sum of 15,400 rupees, which, on an inspection of accounts, he found to be due to the plaintiff from the defendant. The Judge of the City Court, after inspecting the above documents, and taking the evidence of witnesses for the plaintiff, who deposed to the due execution of the deeds by the defendant, to his receipt of the advance of 38,317 rupees made to him by the plaintiff, and to his failure in fulfilling the terms of the engagement, gave judgment in favour of the plaintiff for the recovery of the amount

the penalty, for every seer of silk remaining undelivered, as well as for the balance of silk remaining due on the advance; the court of Sudder Dewanny Adawlut held, that, according to the spirit of the contract, B was entitled only to recover the penalty on the non-delivery of silk, for which an advance had been made.

specified in his claim, with costs against the defendant. On appeal by the defendant from the above decision to the Provincial Court of Moorshedabad, that Court affirmed it, dismissing the appeal with costs. On a further appeal by the appellant to the Sudder Dewanny Adawlut, this Court were of opinion, that Mr. Ramsay had (by the insertion of his name in the deed executed by the defendant), become a party in the transaction; that it was therefore requisite for him, either to appear and plead as one of the respondents in the cause, or to sign a declaration stating, that he was in no way concerned or interested in the transaction to which the suit related. A declaration having been made by Mr. Ramsay of his having had no interest whatever in the transaction in question, that gentleman was absolved from all concern in the cause. The Sudder Dewanny Adawlut (present H. T. Colebrooke and J. Fombelle) concurred in the decrees passed by the City and Provincial Courts, with the exception of the orders regarding the amount of the penalty payable by the defendant, under his engagement. The Court observed, that as the respondent had only made an advance to the appellant for the first delivery of silk required, he could not, from the tenor of the engagement, be subjected to the payment of a penalty, for the failure of his engagement, with respect to the other deliveries, the advances for which he had not received. But that, as the appellant had failed to furnish 48 maunds, 38 seers (or 1,958 seers) necessary to complete the first delivery, he must be considered liable to the penalty due on the above quantity. The decrees of the City and Provincial Courts were accordingly amended, and, after deducting the sum of 5,000 rupees from the amount of the penalty decreed by those Courts, judgment was given in favour of the claim of the plaintiff, with interest, on the amount finally decreed, from the date of the decision in the City Court. The respondent was directed to reimburse the appellant for the costs decreed against the latter in the lower Courts, on account of the sum of 5,000 rupees, deducted as above stated. Costs in this Court were rendered payable by the parties in proportion to the final judgment.

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Suroop-
chund Das,
v. Henry
Masseyk.

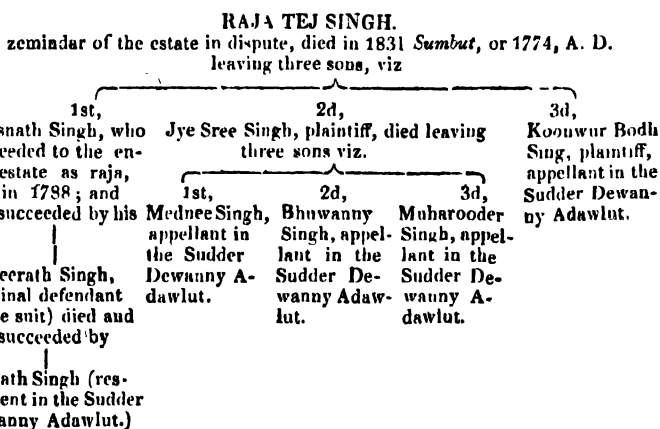
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Nov. 17th.

KOONWUR BODH SINGH, and the Heirs of JYE SREE SINGH, Appellants,
versus
SEONATH SINGH, Heir of MUNEE RATH SINGH,
 Respondent.

The landed estate of a refractory zemindar being confiscated, it was conferred on a person in remuneration for public services, and on his death it was held by his son, and afterwards by his grandson, to the exclusion of all other members of the family. On the suit of two sons of the original grantee to participate with their nephew, judgment was given against them, the zemindaree being one of those estates not liable to division, recognized by regulation 11. 1793. Provision was made in the future abolition of the custom, and it was enacted, that, after the 1st of June 1794,

THIS was an action brought in the Zillah Court of Ramghur, on the 19th of April 1802, or 1st *Bysakh* 1859, *Sumbut*, by Jye Sree Singh and Koonwur Bodh Singh, to recover from Raja Muneerath Singh two thirds of the estate of pergunnah Ramghur; the annual produce of which was stated at 33,865 rupees. The following is a sketch of the family of the parties:



It was set forth in the plaint, that Raja Mookund Singh, a former zemindar of pergunnah Ramghur, having contumaciously refused payment of his revenue, and openly resisted the authority of Government, a force was in the year 1772 sent under the command of Captains Camac and Goddard, for the purpose of reducing him to obedience; that Tej Singh, the ancestor of the parties, aided principally by his second son Jye Sree Singh (one of the plaintiffs), afforded material assistance to those officers in subduing the above named Raja, and in subjecting the territory bordering on the hills of Ramghur, to the authority of the British Government; that Mookund Singh having, in consequence of his contumacy, been deprived of his estate, it was intended by Government, to confer the same, together with the title of Raja, on Jye Sree Singh, in consideration of the services which had been rendered by him, but that he declined in favour of his father Tej Singh, to whom the estate in question and the title of Raja were accordingly granted; that Jye Sree Singh was deputed by his father Tej Singh to proceed to Patna (the Governor General Mr. Hastings being then at that city), for the purpose of there executing on his part the necessary engagements with Government, regarding the revenue payable on the estate in dispute; that previously to his (Jye Sree Singh's) departure, Tej Singh entered into

a written agreement, wherein he declared his estate to be divisible in equal portions between his sons; that on his return from Patna, the three brothers continued to live united with their father, until the period of his demise, which took place in 1831 *Sumbut*, or 1774 A. D.; that the plaintiff Jye Sree Singh being absent at the time of the actual occurrence of this event, Parisnath Singh succeeded to the entire estate, and was invested as Raja by Captain Camac and Major Crawford, but that the funeral obsequies of Raja Tej Singh were afterwards performed in concert by the three brothers; that the plaintiff, Jye Sree Singh and his brother Koonwur Bodh Singh, maintained a force for the protection of the estate in dispute, which was in no year completely freed from the predatory incursions of neighbouring enemies; that for the support of this force Parisnath Singh granted them certain villages, besides a pecuniary allowance assigned on the *Sayer Mehal*, but that the expences of the three brothers, attendant on the ceremonies of funeral and marriage, were defrayed in common; that a difference having on one occasion arisen between Parisnath Singh and the plaintiffs, the former acknowledged the deed of partition executed by Tej Singh, with the terms of which he declared his readiness to comply whenever circumstances should render it necessary, but that a reconciliation having been afterwards effected between the brothers, no division of the estate took place, and the brothers continued associated until the death of Parisnath Singh in the year 1840, *Sumbut*; that Parisnath Singh was succeeded by his son Muneerath Singh, with whom the plaintiffs had wished to continue to live united, but that as Muneerath Singh evinced no attention to the management of the estate, nor any disposition to abide by the engagement of his father, but, on the contrary, treated the plaintiffs as strangers, and acted in all respects as if his interests were separate; the plaintiffs had brought the present action for a partition of the estate, and for possession of two-thirds of it, in conformity with the tenor of the instrument executed by Tej Singh their father, and the established law of inheritance. By the defendant it was contended, that the former refractory zemindar, Mookund Singh, had been expelled by Raja Tej Singh, in conjunction with the British forces, without any assistance from the plaintiff Jye Sree Singh; that the assertion of the plaintiffs regarding the absence of Jye Sree Singh at the time of the decease of Tej Singh was false, both the plaintiffs having themselves assisted in the formal investiture of his (the defendant's) father Parisnath Singh, as Raja and successor to the entire estate; that the plaintiffs were merely *jageerdars*, and had never lived in association with himself or his father Parisnath Singh, by whom sundry villages had been assigned to them in consideration of the performance of certain services; that, according to the custom of the mountainous country, and to the usage of the family, the estate was not divisible, but that, on the death of the Raja for the time being, he is always succeeded in the *raj* and zemindaree by the eldest son, to the entire exclusion of the other branches of the family; that Parisnath Singh was in the year 1774 confirmed as sole proprietor of the estate in dispute by the then Governor General Mr. Hastings; and lastly, that the claim of the plaintiffs

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such estates should descend according to the Moohummudan and Hindoo laws of inheritance. But this provision not held to be applicable to the present case, the father of the claimants having demised in the year 1774.

1813. must be barred by the operation of the rule of limitations. The plaintiffs, in replication, did not admit the existence of the usage alleged by the defendant as determining his succession to the estate in dispute, nor the validity of the custom in the present instance; the zemindaree having been acquired by Tej Singh. They also contended, that even allowing the existence of the custom, the exclusive right of the eldest son was, in this case, renounced by the agreement on the part of the defendant's father, to the partition intended by their ancestor Tej Singh. Numerous exhibits were filed by the parties, of which the following, as bearing immediately upon the case, chiefly deserve specification. An instrument, purporting to have been executed by Maharaja Tej Singh on the 5th of *Jeth* 1820, *Sumbut*, reciting, that Jye Sree Singh having rendered him essential service when acting in conjunction with the force under Captains Camac and Goddard, he had, in consideration thereof, deputed him to accompany Captain Camac to Patna, there to execute in his name the necessary engagements regarding the estate, to be hereafter equally divided between his three sons. A letter from Parisnath Singh, without a date, to the plaintiffs, in answer to one received from them, reciting, that he was aware of the existence of the document alluded to by the plaintiffs, the validity of which it was never his intention to dispute; that he was anxious that the management of the estate should be conducted by the three brothers, in concert with each other, and that their several expences should be defrayed in common; that, if any such difference should arise, as to render a partition necessary, he would then agree to its being made, but that until then he wished to live with them united. A *purwana* dated 1st *Shuhri Rubee oos sanee*, 17th *Jooloos*, or 17th year of the reign of Shah Aulum, corresponding with the year 1777, A. D. directed by Captain Camac to Jye Sree Singh, wherein, that officer (after acknowledging the receipt of a letter from Jye Sree Singh, and mentioning the assistance he had received from him in bringing the mountainous country under the British authority,) recommended him not to make himself uneasy regarding a separation of the estate, since it would be in his power at any time to produce the document executed by Tej Singh, authorizing that measure; adding, that he counselled him not to require a partition so long as he continued on good terms with his brother Raja Parisnath Singh, but to report to Government whenever he found himself involved in difficulties and disagreement with the said Raja, when he might rely upon an order from Government directing a partition between the brothers. 4th, A *purwana* dated 6th of March 1782, A. D. directed by Major Crawford to Jye Sree Singh, wherein, after acknowledging the receipt of a letter from him, and stating, that he had spoken in his favour to Raja Parisnath Singh, and that the Raja informed him it was not his wish or intention, "to create a disagreement on any point, that if differences should thereafter arise a partition might then be made, but that there was no necessity for its being done immediately," he reminds Jye Sree Singh, that the instrument executed by Maharaja Tej Singh is in his (Jye Sree Singh's) possession, to be brought forward when occasion might require it, and adds, that he (Major

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Crawfurd) was about to proceed on service, but should attend particularly to his interests on his return. The defendant exhibited three *pottahs* for the estate in dispute, which had been severally granted to himself, his father, and his grandfather, and produced an order under the Company's seal, and the signature of the Honorable Warren Hastings, Governor General, dated 1774, A.D. directing Parisnath Singh, the defendant's father, to repair to the presidency, for the purpose of being confirmed in the zemindaree of Ramghur, in the place of his father, and receiving the usual investiture. The evidence adduced on both sides, went to support the respective allegations of the parties; the witnesses on the part of the plaintiffs deposing to their having lived united with the defendant and his ancestors, and those brought forward by the defendant deposing to the plaintiffs being merely *jageerdars* residing on the estate, and to their never having had any expences or transactions in common with the defendant or his father. It was the opinion of the Judge of the Zillah Court, that as the plaintiffs had not obtained possession of shares in the contested estate, in conformity with the tenor of the alleged deed of partition by Tej Singh, and had not since his death (a period of 32 years) sued on that account, before any competent tribunal, their claim was not now admissible, and must be barred by the operation of the rule of limitations: the Zillah Judge observed further, that there did not appear to have been any division of the estate in the family of the parties, and considered the order directed by Mr. Hastings to Parisnath Singh, and brought forward by the defendant, as evidence sufficient to prove, that the estate had not come into the possession of the defendant's father or himself, by force or fraud, or other improper means. Judgment was therefore given against the plaintiffs, and costs rendered payable by the parties respectively. On appeal by Jye Sree Singh and Koonwur Bodh Singh from the above decision to the Provincial Court of Patna, that Court concurred in it, for the following reasons; it was held by the Provincial Court, that although the instruments by Tej Singh and Parisnath Singh were, from the documents and evidence brought forward in the case (more especially from the *purwannas* of Captain Camac and Major Crawfurd), proved to have been executed by those persons; and that, notwithstanding the estate in dispute did not appear to be of that description to which the rules contained in regulation 10, 1800, (providing in certain cases for the exclusive succession of a single heir without any division of the property, to landed estates situated in the jungle mehals of Zillah Midnapore, and other districts), could be considered applicable, yet it became in this case necessary to recur to the period, when the landholders were not empowered to make a division of their estates, without the knowledge and consent of Government, and to the custom then in force, by which, on the demise of a zemindar, such one of his heirs as was deemed by the Government qualified, obtained the estate. The Court remarked, that in virtue of this custom Parisnath Singh appeared to have been confirmed by Mr. Hastings in the possession of the estate in dispute; that when Parisnath Singh died, he was succeeded by his son Muneerath Singh, who had held undisturbed possession of the

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1813. **Koonwur Bodh Singh and others, v. Seonath Singh.** estate for 19 years, previous to the date of the institution of the present suit, and that, under the rules contained in regulation 11, 1793, (providing, that a custom according to which some of the most extensive zemindarees were not liable to division, and the estate devolved entire to the eldest son or next heir of the deceased, to the exclusion of all other sons and relations, should be abolished) the claim of the plaintiffs was not maintainable; for, that section 5 of the said regulation contains a provision that it shall not be in force until the 1st of July 1794, and then not to operate retrospectively. The decree of the Zillah Court was therefore affirmed, but the Judges of the Provincial Court being of opinion, that the claim preferred by the plaintiffs was not altogether groundless, the costs were declared payable by the parties respectively. Jye Sree Singh having died while the cause was yet pending in the Provincial Court, was succeeded by his sons, who, under his right and interest in the cause, preferred a further appeal to the Sudder Dewanny Adawlut. Muneerath Singh having likewise died, was succeeded by his son Seonath Singh, who became the respondent in the cause. The following were the grounds on which this Court (present H. Colebrooke and J. Stuart) concurred in the decrees of the Provincial and Zillah Courts. The execution of the alleged deed of partition by Tej Singh, was not proved to the satisfaction of the Court. It was observed, that the strongest evidence which had been adduced in support of the execution of that document, were the *purwannas* stated to have been directed to Jye Sree Singh, by Captain Camac and Major Crawford (in which the instrument in question was clearly recognized), and which, if authentic, must have been considered decisive as to the fact. The Court, however, saw strong reasons for doubting the authenticity of these documents, attested as they were merely by the initials of the names of the above named officers, which were found not to resemble the handwriting of those officers, on other authentic papers. The *purwannas* were suspected also from their appearing to contain an explicit statement of all that was required to support the claim of the plaintiffs, and to explain in some degree the reasons for the delay which had occurred, in not having before made known their claim. From a letter under date the 22d of August 1774, immediately after the death of Tej Singh, addressed by Captain Camac to the Burdwan Council, and obtained by the Court from the records of Government, it appeared, that that officer therein urgently recommended Parisnath Singh as sole successor to the estate without making any mention of the rights of the remaining brothers, or of any arrangement having been projected by Tej Singh, for the equal division of the estate among his sons, and of which, had it existed, it was obvious Captain Camac could not, from his situation, have been ignorant. It also appeared, that the Provincial Council of Revenue at Burdwan were on the 20th of September 1774, informed by Government, of their intention to confirm the succession of Parisnath Singh to the zemindaree of Ramghur, (as a measure consistent with their former resolutions in favour of his father Tej Singh) and of the order requiring the attendance at the Presidency of Parisnath Singh, for the purpose of receiving his investiture. With respect

to the validity of the claim of the plaintiffs, according to the Hindop law of inheritance, the Court observed, that this point turned upon the further question, whether the estate in dispute was to be considered a common zemindaree divisible by the laws of inheritance, or one of those estates which by the custom noticed in and abolished by regulation 11, 1793, descended to one heir in exclusion of all the other members of the family. Adverting however to the extent and situation of the estate, to the zemindar possessing the title of Raja, and to his maintaining a sort of feudal establishment of troops and dependant *jageerdars*; the Court could entertain little doubt, that it was not a common estate divisible by the laws of inheritance. The decrees of the Zillah and Provincial Courts were accordingly affirmed by the Sudder Dewanny Adawlut, and the costs declared payable by the parties respectively.

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HUREE NARAIN RAI, Appellant,
versus
RAJ INDUR RAI, Respondent.

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Dec. 7th.

THIS was an action brought by Raj Indur Rai, in the Zillah A talook Court of Rajeshahye on the 15th of September 1808, (and afterwards removed under the provisions of regulation 13, 1808, to the Provincial Court of Moorshedabad), to recover from Huree Narain Rai, possession of *turruf* Khidurpoor, the annual produce of which was estimated at 5,001 rupees. It was set forth in the plaint, that the *turruf* in question, along with two other *monzas*, viz. Chopeenuggur, and Chundunnuggur, had been sold in 1199, viz. by Maharaja Ramkishen, zemindar of Rajeshahye, to the plaintiff; that as the bill of sale contained the reservatory condition, that these lands should be held as a dependent tenure, the plaintiff solicited the zemindar for a *kharijnameh*, or authority to render the tenure separate and independent, which was granted in the year 1201; that in virtue of this document, he petitioned the Collector for a separation of his purchased talook, in consequence of which petition, he was registered as independent talookdar of Chopeenuggur, and Chundunnuggur, but that the transfer of *turruf* Khidurpoor was postponed, although its separation was repeatedly requested, and although the legality of that measure was established by the *kharijnameh* granted by the original zemindar, as well as by two documents written by his son, in 1205, subsequently to his decease, confirming that grant; that in 1206 the whole of Ramkishen's zemindaree was subdivided into lots, and exposed to sale by public auction on account of arrears of revenue, and that the lot Anoorail, in which the *turruf* in question is situated, was purchased by a person named Bhyroonauth, who recognized the plaintiff's claim to separation, and executed a deed confirmatory of the original *kharijnameh*; that the lot Anoorail having been mortgaged by the auction purchaser to the defendant, it became his property in 1208, but, owing to a suit instituted by the relations of the original zemindar, in the course of which it

originally granted as a dependent tenure, afterwards made independent by a *kharijnameh*, but not actually separated before a public sale of the zemindaree, for arrears of revenue, was included, in the sale under the provisions of section 14, regulation 1, 1801. But the auction purchaser having subsequently acknowledged the right of the talookdar to hold the talook distinct from

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his zemindaree, the separation was adjudged notwithstanding the objections of a second purchaser of the zemindaree by private sale from the first purchaser.

was attempted to prove, that Bhyroonauth was merely the nominal and that the son of the former zemindar was the real purchaser of the lot Anoorail, the lands were held *khas* until the decision of the suit in 1213, when a decree was passed, affirming the validity of the purchase; and the defendant having become seized of the property, ousted the plaintiff from the *turruf* Khidurpoor, which was included in it; that the plaintiff had retained possession of the *turruf* in question, during the whole period that had elapsed between the date of the original grant, and the decision of the abovementioned suit, and had regularly paid the revenue to Government. It was averred in reply by the defendant, that the bill of sale and other documents to which the plaintiff alluded, were forgeries, prepared and antedated for the purpose of defrauding the purchasers of the estate; that the present claim had originated under the influence of the same fraudulent motives as had actuated the institution of the former suit, regarding the *benamee* purchase; that in 1206, before the lands were held *khas* by Government, the plaintiff, so far from considering that he had a right to hold the *turruf* as an independent tenure, actually took a sub-lease of it, in the name of his deputy Sheokishen, from Bhyroonauth the auction purchaser; that he (the defendant) had cleared off the arrears of revenue with which the lot was incumbered, and had become legally possessed of the property, in conformity with the decisions of the Zillah and Provincial Courts; that had the plaintiff been confident of the justice of his claims to separation, he would have preferred them previously to the sale of the zemindaree by public auction; and that even admitting the validity of the documents he alluded to, they could not now operate in his favour, in consequence of the limited period for separation prescribed by section 14, regulation 1, 1801, having elapsed.

It appeared to the Senior Judge, that Rajah Ram Kishen sold the *turruf* in dispute to the plaintiff, for the sum of 1,715 rupees, to be held dependent on his zemindaree, and two years after the sale (the plaintiff being his son in law) executed a deed in his favour, empowering him to hold the *turruf* as an independent tenure; that he consequently petitioned the Collector several times, to register his name as an independent talookdar; and that the Collector having instituted proceedings to ascertain the propriety of that measure, was induced to refuse the request, upon discovering that the word *puttun* had been used in the *kharijnama*, though no objection existed on the part of the succeeding zemindars. The above facts appeared, from the bill of sale and *kharijnameh* granted by Ramkishen, from the confirmatory documents signed by his son, from the reply of Bhyroonauth to the Collector, acknowledging the right of separation, and from the Collector's proceedings, which were all filed by the plaintiff. The Senior Judge was further of opinion, that the claim of the plaintiff was not in any way invalidated by the evidence adduced by the defendant. The assertion of the papers being forged could not be supported by any sort of proof. On the contrary, the handwriting they exhibited, exactly corresponded in appearance with other manuscripts, known to have been written by the proprietors. The document in the name of Sheokishen, filed by the defendant, con-

taining an agreement on the part of the plaintiff, to hold the *turruf* as an under tenant, at an advanced *jumma*, was not considered genuine. It was not probable that the plaintiff should have engaged for a higher rate, while his own claim was pending before the Collector, or that, even if he had done so, the deed of agreement should fall into the hands of the defendant. Had he commissioned Sheo Kishen to act on his behalf, he would certainly have furnished him with a *mokhtarnameh*, but no such document was forthcoming, moreover, it was proved by receipts and other documents adduced by the plaintiff, that he held immediately of Government, while the lands remained *khas*. The plea of the defendant, stating that the plaintiff was dilatory in applying for separation, seemed to be inadmissible, the reverse being proved by an inspection of the Collector's books. As the refusal of that officer to separate the *turruf* in question appeared to have originated in a mistaken interpretation of the word *puttun*, occurring in the *kharijnameh*, which had been held to mean "dependent," while, in reality, it signified "constituting," and as the plaintiff's right to separation appeared to have been satisfactorily established, the Provincial Court passed a decree in his favour, with costs payable by the defendant, directing the Collector to separate the *turruf* Khidurpoor from the zemindary of the defendant, and to cause an entry of the plaintiff's name to be made in the registry, as independent talookdar of the same. On appeal from the above decision to the Sudder Dewanny Adawlut, that Court deemed it expedient to call for the original exhibits filed in the Provincial Court by the respondent, or for authenticated copies of them. These papers were transmitted, and their validity was fully established; the bill of sale by Maharaja Ramkishen, the *kharijnameh* subsequently granted by him, the confirmatory documents by his son, and that by Bhyroonauth, the auction purchaser (recognizing the right of separation vested in the respondent), were proved to be genuine by the testimony of several witnesses, who either witnessed the signature of those persons, or deposed to their handwriting. The Court of Sudder Dewanny Adawlut (present H. T. Colebrooke and J. Fombelle), considered that, although by section 14, regulation 1, 1801, the rights of the respondent (being involved in those of the former zemindar) were transferred to the auction purchaser (Bhyroonauth), yet, that the latter had formally and voluntarily relinquished the privileges with which he became thus invested, by acknowledging and confirming the original grant; and that the appellant, who derived his rights from Bhyroonauth, could not be entitled by his purchase to any privilege which had been previously relinquished by the person from whom he purchased. That part of the decree of the Provincial Court therefore was confirmed, which recognized the respondent's right to separation, but as the Provincial Court had not issued any order for fixing the *jumma* according to the regulations, the decree of that Court was amended as follows: It was decreed, that the respondent should be put in possession of the *turruf* Khidurpoor, and that he should continue to pay the usual revenue to Government through the appellant, until the Collector should ascertain the rate of assessment to be levied on the parties, and receive

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their engagements for the due discharge of the same, according to the rules laid down in regulation 1, 1793, and regulation 5, 1810; and further, that at the conclusion of the arrangement, the respondent should be considered as holding an independent tenure and should receive from the appellant the mesne profits of the lands. The expences of separation and the costs in both Courts were made payable by the parties respectively.

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Dec. 7th.

BABOO GOPEE MOHUN, Appellant,

versus

ISHRYCHURN, and Others, Respondents.

A talook being separated from a zemindaree by the consent of the parties concerned, and assessed by the collector at a rate of *jumma* to which it was subjected previously to the separation, without reference to its actual produce; such assessment declared null and void, and another directed to be made, according to clause 5, section 10, regulation 1, 1793, which prescribes, that when a portion of an estate shall be transferred by private sale, gift, or otherwise, the assessment upon that

THIS was an action brought by Baboo Gopee Mohun, in the Zillah Court of Jessore, on the 15th of February 1804, or 5th *Phalgun* of the Bengal year 1210, against Ishrychurn, talookdar, and two others, possessors of *kismut* Moolgurh, &c. formerly dependent on pergunna Churulia, the zemindaree of the plaintiff. The object of this suit was to procure a deduction of 832 rupees, 8 anas, in the revenue made payable by the plaintiff, by transferring the said sum to the charge of the defendant's estate. It appeared that the zemindaree in which this talook was situated, appertained, until the year 1181, B. S., to Rajchunder Rai, whose estate was at that period sold on account of arrears of revenue, and purchased by Hureenarain Gosaul, from whom, in the same year, the father and grandfather of the defendant, Ishrychurn, obtained possession of the talook as a dependent tenure. In 1202, B. S., the whole zemindaree was sold at the sheriff's sale, when Nubkishen purchased it on account of his son Rajkishen, the half-brother of the plaintiff. Rajkishen continued invariably to receive the rent, at the usual rate, from the talookdar, until the year 1207, when a petition was presented to the Collector in the name of Rajkishen, praying that the talook might be separated from his zemindaree. This request was acceded to by the Collector. In the year 1208, B. S., the plaintiff was associated with his half-brother in the zemindaree, in consequence of an order of the Supreme Court, where he had sued for joint possession. The plaint set forth, that the talook in question formed part of the zemindaree of the plaintiff, and was not liable to separation; that, although the profits derived from it varied in their amount, and were once so high as 1,387 rupees, 8 anas, yet it had been assessed at the rate of 555 rupees only, by which means the balance, viz. 832 rupees, 8 anas, was unduly assessed on the remainder of the zemindaree; that the separation had taken place, not at the instance of his half-brother, but by means of the fraudulent practices of his *vakeel*. It was averred in reply, by the defendant, Ishrychurn, that the talook in question was an independent tenure, and had existed as such for some time previous to the plaintiff's acquisition of the zemindaree; that it had been separated and its rate of assessment determined by the Collector according to section 11, regulation 8, 1793, after an inspection of the title deeds and other documents; that the plaintiff's claim was founded on a sheriff's sale made subsequently to the

decennial settlement; and that he could not be justified in levying extraordinary taxes, or in any wise infringing the rights declared by Government to belong to the inferior landholders; that, had there been any fraud in the transaction of petitioning for separation, it would have been brought to light by Rajkishen, whose interests were involved in the result: that, lastly, the present suit was illegal, the plaintiff not having been joined in it by his brother, who equally participated with him, in all the rights appertaining to the zemindaree. The facts were, that in the year 1204, Raja Rajkishen complained, that the talookdar of Moolgurb, &c. did not discharge the rents due on his portion of the estate, and petitioned the Collector to compel him to do so, or to hold the talook as an independent tenure, paying the revenue immediately to Government. In consequence of this petition, the talookdar was called upon, when he delivered in sundry vouchers, consisting of settlements made by former zemindars, receipts, &c. which proved that the actual amount of rent paid for the talook had been hitherto confined to the sum of 555 rupees annually. The Collector accordingly, in 1207, separated it from the zemindaree, fixing the assessment at the abovementioned rate. The documents, on the authority of which this arrangement chiefly rested, were, first, a written agreement entered into by Hurreenarain Gosaul, the former zemindar, in 1188, secondly, an adjustment of accounts for the year 1198, and thirdly, receipts for the years 1205 and 1206, all of which demonstrated, that, no larger annual sum than 555 rupees had been paid as rent for the talook in question. These vouchers were produced in Court, and several witnesses were called on by the defendant, who satisfactorily proved their authenticity. To counteract these statements, the plaintiff filed several documents, with a view of proving that the amount of rent levied on the talook varied in different years, and he offered to bring forward evidence which would establish this fact. As this suit was instituted under section 12, regulation 8, 1793, which gives liberty to the zemindar, if dissatisfied with the separation of a talook from his estate, to sue the holder of such talook, in the Dewanny Adawlut, for the right of property in the lands, and the Zillah Judge being of opinion, that this suit was not warranted by the regulation above quoted (inasmuch as this related merely to an error in determining the rate of assessment, which did not rest with the defendant, whose claim to separation had been established by the Collector's proceedings,) gave judgment in favour of the defendant, with costs against the plaintiff. On appeal from the above decision to the Provincial Court of Calcutta, it was insisted on, for the plaintiff, that the talook in question could not be separated, unless by the mutual consent of the parties, it being a dependent tenure: that the illegal separation took place three months after the proprietary right in the zemindaree had been decreed to the plaintiff, by a judgment of the Supreme Court; and that, his consent to the measure had never been obtained, nor even required; that all the *abwabs*, or extraordinary taxes, had been consolidated in 1197, (the period of the decennial settlement,) when the accounts delivered into the Collector's office exhibited the sum of 1,258 rupees, 9 annas,

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portion so transferred shall be fixed at an amount which shall bear the same proportion to its actual produce, as the assessment upon the whole estate may bear to the whole of the actual produce.

1813. 15 gundas, 1 cowry, as the annual assessment of the talook; that, in the year 1202, this rate was encreased, when, on account of arrears, the talook was attached, and the defendant agreed to pay a further sum (55 rupees), on which condition the attachment was removed; and that the accounts for the year 1205, B. S. Ishrychurn and others. exhibited an encreased rate of assessment on the talook, amounting to 1,387 rupees, 8 anas. The papers relative to the decennial settlement were produced from the Collector's office, and they confirmed the statement of the plaintiff, as far as related to the amount of rent, to discharge which, the talook was declared liable. To prove the fact of the agreement stated to have been entered into by the defendant in 1202, an *ikrarnameh*, or written declaration, was adduced, but not being duly authenticated, proved nothing, and another document relative to the year 1205, purporting to be official, but which, not having the requisite signatures, was considered inadmissible. The document, on the other hand, filed by the defendant, regarding the settlement made by the former zemindar in 1188, was duly authenticated and signed by Hurreenarain. This deed recited, that the rent of the talook was fixed at 555 rupees annually. On these grounds, the Judges of the Provincial Court were of opinion, that notwithstanding the accounts prepared at the period of the decennial settlement, no higher rate of rent than 555 rupees had been paid for the talook; that the plaintiff's claim to a higher rate of rent was totally inadmissible, and as he became possessed of the zemindaree, not by a purchase at public auction, but, by virtue of an order of the Supreme Court, they considered themselves as not competent to alter the proportions of assessment. The decision of the Zillah Judge, in affirming the defendant's right to separation, was at the same time held to be erroneous, inasmuch as, he (being a dependant talookdar) could not possess that right, by section 16, regulation 1, 1801. It was therefore decreed, that the talook should be reannexed to the zemindaree; and hereafter be considered as a dependent tenure, at the stated rent; and that the costs of the suit should be discharged by the parties respectively. The appellant made a further appeal from this decision to the Sudder Dewanny Adawlut. In the mean time, Ishrychurn had died, and his heirs, Goureenath and Ram Tunnoo, became the respondents in this suit. It was alleged for the appellant, that even admitting the validity of Ishrychurn's voucher, purporting to have been executed by a former zemindar, fixing the rent of the talook, inclusive of all charges, at 555 rupees, yet that circumstance did not confer a right on his heirs to retain the talook as a *mokurreree* tenure, at the same rate; that the other documents, being without the requisite signatures, were invalid, although several witnesses had affirmed their authenticity; and that the method by which the appellant became seized of the zemindaree, could not, in any way, affect his rights as a zemindar. The respondents replied, that Ishrychurn's voucher was sufficient to establish an hereditary right of succession to the talook on the stated terms, and to establish the right, it was not necessary that it should be expressed, as in the case of a new grant, for it was necessarily implied, this being simply a confirmatory deed. The Judges of the Sudder

Dewanny Adawlut, (present H. T. Colebrooke and J. Fombelle); 1813.
 after an attentive consideration of the pleadings on both sides, were of opinion that the appellant was bound by the act of his predecessor, who applied to have the talook separated from his zemindaree, but that the Court of Appeal decided erroneously in determining the *jumma* at 555 rupees, solely upon the vouchers produced by the talookdar. That part of the decree therefore was reversed, which directed that the lands in question should be reannexed to pergunna Churolia, as a dependent tenure, at a *jumma* of 555 rupees, and it was finally decreed, that the talook should be considered as a distinct *mehal*, and the assessment fixed on the lands composing it, and on the remainder of the zemindaree, in the manner prescribed by clause 3, section 10, regulation 1, 1793. The costs in this Court were made payable by the parties respectively.

THE COLLECTOR OF TIPPERAH, Appellant,
versus
 GHOLAM NUBEE CHOWDRY, Respondent.

1813.

Dec. 24th.

THIS was an action brought by Gholam Nubee Chowdry, in Claim to the Zillah Court of Tipperah, on the 15th of February 1805, or the 25th of *Magh* 1211, against the Collector of the said Zillah, for dispossession from a six ana share of pergunna Gopaulpoor Mir-zanuggur, which share the plaintiff claimed as a separate independent proprietary right. The annual produce was estimated at 9,727 rupees. On the 10th of November 1801, corresponding with the 26th *Kartick* 1205, B. S., the Collector (Ryley) considering the 6 ana share aforesaid to form part of a joint undivided estate, and to be comprised in the 16 ana share of the said pergunna, registered it as such accordingly, and directed the several proprietors to elect a manager; on their failing to comply with this requisition, a manager was appointed by the Collector, in pursuance of the regulation applicable to such cases, and on its appearing that the zemindaree had fallen into great arrears of revenue, an *aumeen* was deputed to attach the lands. The plaintiff, thinking himself aggrieved by this proceeding, addressed a petition to the Board of Revenue, in which he stated that by a partition of the zemindaree, which took place a long time back, Moohummud Kasim became possessed of a four ana share, and Moohummud Reza, his uncle, and Moohummud Mustafa, his father, remained in joint possession of the twelve ana share; that this latter share also was separated in 1182, by order of Mr. Shakespear, each brother retaining a distinct proprietary right; that he, the petitioner, succeeded to his father's share, and continued to pay the revenue assessed upon it, viz. 8,667 rupees, 14 anas, 16 gundas, 1 cownie, for a period of 22 years, during all which time he was furnished with separate receipts for his payments. The petition concluded, by stating, that the shares abovementioned had been unjustly united by the collector, and registered as a joint undivided estate, and that the

1813. interests of the petitioner were materially suffering from the
 ————— expence to which he was put, by being compelled to support the
 The Col- *arumeens* and other officers deputed by Government to realize the
 lector of arrears, into which the whole estate had fallen. On receipt of
 Tipperah, this petition, the Collector was called upon to state the facts of the
 v. Gholam case, and to ascertain the precise nature of the tenure, by which
 Nubee Gholam Nubee had hitherto held a six ana share of the zemindaree. From his reply, it appeared, that he did not conceive the
 Chowdry. petitioner had a right to hold that share as a separate unconnected
 estate. At this time, the several sharers having paid up their
 arrears, and of themselves nominated a manager over the estate,
 the Government officers had been recalled. The petitioner conse-
 quently could have no grievance on this head. The Board of
 Revenue, on receipt of this report, directed the petitioner to institute
 a suit in the Zillah Court, by which measure the point in dispute
 viz. his right to hold the share as a separate tenure, might be
 ascertained. The plaint was similar in substance to the petition,
 and a *tukseem-nameh*, or deed of partition, was adduced in support
 of the fact of the partition. It was also alleged by the plaintiff,
 that the Collector, at the time of the decennial settlement, assessed
 his share, proceeding by a comparative estimate of the foregoing
 five years; and to establish this assertion, the accounts of the
 pergunnah for that period were produced. Several receipts also,
 granted by the Collector, in the name of the plaintiff alone, for the
 six ana share, were given in, to prove that he had the sole prop-
 erty right. The defendant, in answer, stated that the document
 by which the partition of the estate was attempted to be proved,
 had not been duly authenticated; and that it did not bear the
 signatures of the several sharers; that, on the contrary, two of
 them had presented a petition shewing its invalidity; that the
 assessment alluded to by the plaintiff had not been made on
 distinct portions of land; but had been levied on the proprietors
 in proportion to the interest they possessed in the estate respec-
 tively, and that, although separate receipts had been granted, yet
 that was an irregular proceeding, and did not by any means estab-
 lish the legality of the partition. The plaintiff, in replication,
 urged the absence of one sharer, and the minority of the others, as
 the cause of the omission of their signatures; and to obviate the
 objection of the partition not having been made *mouzuwaree*, or
 by distinct portions, it was affirmed, that the nature of the property
 would not admit of this arrangement; the value of lands being
 subject to continual fluctuation, from their proximity to the river,
 great insecurity of property would have been the consequence of
 such a partition. The Zillah Judge did not consider it incumbent
 on him to ascertain the truth of the plaintiff's plea, respecting the
 lands having been actually separated, but, that whether the estate
 had been legally separated, or should be held as a joint tenure,
 was the point which should be attended to. The reason assigned
 by the plaintiff for a *mouzuwaree* partition not having taken place,
 was held to be futile, inasmuch as it did not apply to other parts
 of the zemindaree, which were at too great a distance from the
 river to be affected by its encroachments. The *tukseemnameh*, or
 deed of partition, was not considered a valid instrument. Judge-

ment was therefore given against the plaintiff dismissing his claim, with costs. On appeal from the above decision to the Provincial Court of Dacca, that Court reversed it, the documents confirmatory of the partition, &c. being deemed sufficient proof. It was decreed, that the zemindaree should remain divided, on the terms contained in section 27, regulation 8, 1793, according to the following proportions: a four ana share, on account of Moohummud Kasim; a six ana share, on account of Moohummud Mustafa; and a six ana share, on account of Moohummud Reza, the father and predecessor of appellants. It was further decreed, that the separation of any new alluvial lands, which might accrue to the estate, should not be prevented by this decision. The costs in both Courts were made payable by the parties respectively.

1813.

The Collector of Tipperah, v. Gholam Nabee Chowdry.

The Judges of the Sudder Dewanny Adawlut, (present J. Fombelle and W. E. Rees) on appeal, were of opinion, that the partition had not been legally made; for, if it had, the respondent, at the time of the decennial settlement, would have entered into a specific engagement for his own estate; and it appearing from the evidence, that the assessment had been levied on the several partners in proportion to their respective interests, without reference to measurement, or estimation of the produce of their several portions, the settlement so concluded was held irregular and invalid. The decree of the Provincial Court was therefore reversed, and the claim of the respondent was finally dismissed with costs.

BYJNAUTH MUJMOODAR, Appellant,

1814.

versus

DEEN DYAL GOOPUT, Respondent.

Jan. 22d.

BYJNAUTH Mujmoodar, the original plaintiff in this case, brought an action in the Register's Court of Zillah Dinagepore, on the 29th of January 1801, against Deen Dyal Gooput zemindar and his tenants Mutun Mundul, and Peer Moohummud Mundul, to recover the sum of 124 rupees, the value of timber unduly appropriated by those persons. It appeared in evidence, that the month of *Phalgun* 1205, or February 1799, the *Chukla* of Ghoraghaut, forming the zemindaree of Raja Radhanauth, was divided into six lots, and disposed of by public auction, for the satisfaction of arrears of revenue. The plaintiff purchased for Govindpore, comprising Baungurh and many other mouzas, in which were forests of saul and other trees. Deen Dyal Gooput purchased lot Hinchalgaree of the same *Chukla*, besides the proprietary right to the *bunkur* of the entire estate. From the report of an *aumcen*, who was deputed to ascertain the site of the forests in which the timber had been felled, it appeared that they were situated within the limits of the lands purchased by the plaintiff. It remained, therefore, to define the privileges which the owner of the soil and the owner of the *bunkur* were entitled to respectively. On the part of the plaintiff, two persons, who had held talooks under the former zemindar, were brought forward

Apurchases at a public sale a portion of a zemindaree: B purchases another portion, besides the *bunkur* of the whole estate; determined that the *bunkur* purchase made by B, conveys to him all the forest timber, though growing in the portion.

1814. to prove, that previously to the sale of his estate, he retained the superintendence of the saul forests in his own hands, and that the profits arising from them were consolidated with his landrents and formed a considerable portion of his revenues. It was argued for the defendants, that the above allegation, though admitted, could not lead to the inference that every proprietor of the soil must invariably enjoy the profits of the timber growing on his estate, and that although the former zemindar had refrained from farming the *bunkur*, yet (the rights vested in him being absolute), the mode in which he had managed the collection of his rents was a matter of no importance. It was farther insisted on, that the right of *bunkur*, *ex vi termini*, necessarily conferred a property in the timber. The Register, relying on the evidence of former usage, and being of opinion that such large trees as saul, &c. were not included in the right of *bunkur*, gave judgment in favour of the plaintiff, with costs. The Zillah Judge, on the 23d of February, confirmed the decision on appeal. In the mean time, the defendant had continued to fell trees from the lands of the plaintiff, while the suit was pending; in consequence of which, they were again sued on the 2d of April 1802, in the Zillah Court of Dinagapore. The plaintiff laid his damages at 2,414 rupees, 2 anas, and on the same principle as that which guided the former decision, obtained judgment for the full amount claimed; the defendants not making any exception to the estimated value of the timber. Deen Dyal Gooput and the other defendants, being dissatisfied with the above decision, preferred an appeal to the Provincial Court. The same title had formerly been tried between Deen Dyal Gooput and another party; and the decree of the Provincial Court awarded the profits of the timber as necessarily forming a part of the right of *bunkur*. This document was given in evidence. The Provincial Court being of opinion, that the trees then standing on the lands purchased by Byjnauth, were not included in his purchase, reversed the decree of the Zillah Court, but left it optional with him to bring an action of trespass against Deen Dyal in the Zillah Court, with a view of trying his right to the forest lands; observing, that should the result of the trial prove that Deen Dyal had trespassed where he had neither right of soil, nor of *bunkur*, an action might be brought to recover the value of the timber unduly appropriated. Accordingly, on the 14th of January 1807, Byjnauth again sued Deen Dyal Gooput in the Zillah Court, to recover possession of the forest lands; estimating the annual profits at 971 rupees, and giving in evidence his purchase by auction of Baungurh and the other mouzas in which the forests were situated. The defendant, in answer, averred that this was insufficient to establish the claim, as it tended to prove a title in the cultivated lands only; and not a right to the profits of the *saulbun* or forests. The Zillah Judge, however, relying on the evidence adduced in the former trial establishing the usage of the late zemindar, and proving that the saul forests in which the trees had been felled were situated within the zemindaree of the plaintiff, gave judgment in his favor, with costs. On the 27th of February 1801, an appeal was admitted

purchased by A. The latter, however, from his right in the soil, permitted to clear away the trees and cultivate it, the proceeds of the timber felled appertaining to B.

by the Provincial Court, and, after receiving evidence of Deen Dyal's having actually purchased the *bunkur* of Ghoraghaut, the Court again reversed the decree of the Zillah Judge, awarding to Deen Dyal the proprietary right to all the timber of spontaneous growth in the zemindaree. Byjuanth Mnjmoodar, v. Deen Dyal Gooput. 1814.

Byjuanth being desirous of appealing from the above decision, and it being considered desirable (with a view of furnishing a precedent), that the relative rights of the parties in this case should be clearly defined, a special appeal was admitted by the Sudder Dewanny Adawlut on the 23d of November 1808. The appellant filed a document purporting to have been written by the late zemindar, addressed to his agent, whom he desires to take special care to abstain from farming out the saul forests, remarking, that they should be kept quite distinct from the *bunkur*, which merely conveyed the right of pasture, and a few other unimportant privileges. A *jumma wasil bakke*, for the mouza of Phoolbaree (a portion of the zemindaree in question), was also filed, from which it appeared, that the profits of the saul trees were included under the head of land rent, and a copy of the auction sale papers, to prove that the rent of the *bunkur* had not been apportioned over the several parcels of the zemindaree, but had been consolidated with the *jumma* of lot Hinchulgaree, and assessed at the low rent of three rupees, although the annual profits of the saul forests, in the time of the former zemindar, sometimes amounted to 1,000 rupees. From these circumstances, it was inferred for the appellant, that the *bunkur*, and the saul forests, were always considered distinct, and that the owner of the one was not necessarily to enjoy the other. The respondent denied the authenticity of the first document. With respect to the *jumma wasil bakke*, he contended, that it proved nothing, inasmuch as the former zemindar being absolute, might bring his profits to account under whatever head he pleased, and that the low rate at which the *bunkur* had been assessed was no argument against its including the profits of the saul forests; it frequently happening that the value of teneures is under-rated, as well as over-rated; especially when the profits are variable, as in the present instance. Several other decrees in analogous cases were cited; in all of which it had been determined, that a purchase of *bunkur* involved a right to all profits arising from every description of timber. The Court of Sudder Dewanny Adawlut (present H. T. Colebrooke and J. Fombelle), on a consideration of all the circumstances of the case, were of opinion, that trees of spontaneous growth, whether great or small, belonged to the respondent by his purchase of the *bunkur* of the entire estate of the late zemindar; but that no right to the land on which the trees grew was conveyed by the sale of *bunkur*. The decree of the Provincial Court was therefore amended, and it was finally adjudged, that the appellant, as purchaser of the soil, should enjoy its produce when cultivated; and that the respondent should remain in undisturbed possession of the profits arising from the forests. By agreement of the parties, it was further ordered, that the respondent should not obstruct the appellant in clearing away the forest lands, but should possess the timber

when felled ; and that in the event of the appellants wantonly cutting down any trees, without being able afterwards to cultivate the land, he should make good to the latter whatever loss might be thereby sustained.

1814.

SHEONAUTH RAI (Pauper), Appellant,

versus

March 17th. MUSSUMMAUT DAYAMYEE CHOWDRAIN, Respondent.

Impediments to hereditary succession, held by the Hindoo law to be two fold ; the first temporary and removable, the second perpetual. Offences involving a final exclusion from tribe considered to belong to the latter class.

THE appellant in this case was the adopted son of the respondent, and by virtue of that adoption he sued her for possession of a zemindaree, consisting of a 5 ana share pergunnah Kaknaree, the hereditary property of her late husband. The suit was instituted on the 8th of September 1808, in the Zillah Court of Mymunsingh, but subsequently removed, under the provisions of regulation 13, 1808, to the Provincial-Court of Dacca. The annual profits of the estate were estimated at rupees 13,000. The defendant Dayamyee, pleaded in the first place, the invalidity of the adoption (she not having obtained her husband's consent to the measure); and in the second place, the profligate and abandoned conduct of the plaintiff, which had subjected him to degradation, incapacitated him from performing the funeral obsequies of her deceased husband, and consequently, excluded him from the rights of inheritance. The plaintiff did not attempt to controvert the former plea; and numerous witnesses were adduced, from whose concurrent testimony it was satisfactorily established that his behaviour had for a series of years been marked by offences of peculiar turpitude and atrocity. He had been shamefully addicted to spirituous liquors; he had been in the habits of associating and eating with persons of the lowest description and most infamous character; he had wantonly attacked and wounded several people at different times; he had openly cohabited with a woman of the Moohummudan persuasion; and he had set fire to the dwelling-house of his adoptive mother, whom he had more than once attempted to destroy by other means. The Hindoo law officer of the Provincial Court being required to furnish his opinion on the case, declared that it was competent to the defendant, under these circumstances, to forsake her adopted son, and disinherit him. The authorities cited in his *vyavastha* were as follow: The texts of *Apastamba* and *Santha*: "The heritable right of one who has been expelled from society, and his competence to offer oblations of food, and libations of water, are extinct. One who has been expelled from society is a person who has been excluded by his kinsmen from drinking water in their company, on account of some heinous crime." The text of *Nareda*: "An enemy to his father, an outcast, an impotent person, and one who is addicted to vice, take no shares of the inheritance, even though they be legitimate: much less, if they be the sons of the wife by an appointed kinsman." The text of *Munoo*: "All those brothers who are addicted to vice lose their title to the inheritance." The text of *Yajnyawalkya*: "But

their sons whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, *if free from similar defects*. Their daughters, or the female children of such persons, must be supported until disposed of in marriage. On receiving the above exposition of the law, the Judge of the Provincial Court who tried the cause, dismissed the claim of the plaintiff, considering it totally inadmissible. Sheonath Rai, being dissatisfied with this decision, appealed from it *in formâ pauperis*, to the Sudder Dewanny Adawlut, where it was confirmed by the Officiating Judge who heard the appeal; but in consideration of the appellant's having been taken from the protection of his natural parents, the respondent was directed to supply him constantly with food and raiment. The appellant afterwards petitioned the Court to revise its proceedings, on the ground that two instances had formerly occurred, in which it had been ruled that a father was not at liberty to disinherit his son for offences similar to those attributed to him. The Officiating Judge required an opinion from the Hindoo law officers on the case of the appellant: They declared, that of all the offences proved to have been committed by Sheonath, one only, namely, that of cohabiting with a Moohummudan woman, was of such a nature as to subject him to the penalty of expulsion from his tribe irrevocably; that offences considered with reference to their occasioning exclusion from inheritance, might be considered in a two fold point of view; first, those which involve partial and temporary degradation; and secondly, those which are followed by loss of caste. In the former state, that of partial degradation, when the offence which occasions it is expiated, the impediment to succession is removed, but in the latter, where the degradation is complete, although the sinfulness of the offence may be removed by expiatory penance, yet the impediment to succession still remains; because a person finally excluded from his tribe must ever continue to be an out-cast. The Court (present W. E. Rees) under this exposition of the Hindoo law, seeing no reason to alter its former judgment, did not think proper to comply with the petition for a review.

1814.

Sheonath
Rai, v.
Mussum-
maut Da-
yamye
Chowdrain.

1814.

KULB ALI HOOSEIN, Appellant,

versus

March 17th.

SYF ALI, Respondent.

To constitute a *wuqf* for or pious appropriation, it is not required by the Moo-sulman law that the grant should be express in the use of that term; provided the nature of the tenure be inferrible from the general contents of the grant. *Wuqf* lands are not capable of alienation.

THIS was an action brought by Syf Ali; on the 21st of May 1804, *Jeth* the 10th, of the *Umlee* year 1211, in the Zillah Court of Midnapoor, against Kulb Ali Hoosein, to recover possession of fifty beegahs of *lakhiraj* land, situated in the mouza of Bishenpoor, pergunna Soobunga; estimating the decennial produce at 1,005 rupees. In support of the claim, it was alleged that in 1210 U. S., the plaintiff had purchased the lands in question from Vipra Pershaud Rai, and Gooroo Pershaud Rai, the joint heirs of Chokhoo Ram Rai, on whom they had been bestowed as a *brumhotur* grant by Moolla Futihoodeen Hoosein, the father of the defendant; that the plaintiff, in consequence, became regularly seized of the property and retained possession of it until the following year, when he was unjustly ousted by the defendant. The plaintiff, to prove that he had made a *bond fide* purchase, produced two deeds of sale executed by Vipra Pershaud and Gooroo Pershaud respectively, and dated the 9th of *Asarh* 1200, B. S. by which they transferred their interest in the disputed lands to the plaintiff, on the consideration of receiving from him the sum of 250 rupees each; and in confirmation of the grant alleged to have been made to the father of those persons by Moolla Futihoodeen Hoosein, a pottah or lease, executed by the latter person, letting the mouza of Bishenpoor in farm to Sonatun Bhuktea, was given in evidence. The lease was for a period of fifteen years, commencing in 1198, and the disputed beegahs were excluded from the detail of lands therein contained, as appertaining to that mouza. Four witnesses were called, to certify the length of time during which the lands had been enjoyed by Vipra Pershaud Rai, Gooroo Pershaud Rai, and their father. These witnesses declared the property in question to have been held by that family during a period of thirty years; but their statements were founded chiefly on what they themselves had heard from others. No positive proof was brought of the father of the defendant having made a gift of the property to Chokhoo Ram, but the plaintiff asserted that the *sunnud* by which the transfer was effected had been accidentally burnt, and in support of his assertion, he produced a *sooruthaul*, or public notification to that effect, signed by the aforesaid Vipra Pershaud and Gooroo Pershaud, and attested by numerous witnesses. It was contended for the defendant, that the mouza of Bishenpoor, in which the contested lands were situated, had been conferred by a royal grant on his great-grandfather, Durveish Hoosein, to be held as a *muddud mash* tenure for the support of certain religious edifices and colleges, and other pious and charitable purposes. That the superintendence of the lands so appropriated was hereditary, and that his grandfather Abool Hoosein succeeded to it after the death of Durveish Hoosein; that Chokhoo Ram died before Abool Hoosein, and that consequently his father not having himself succeeded to the superintendence of the property during the life time of Chokhoo Ram,

could not possibly have made the alleged gift; that had he executed a *sunnud* to that effect, and had that document been destroyed by fire, yet the transfer would at all events have been inserted in the *bazee zumeen duffer*, or registry of *lakhiraj* lands; and finally; that the gift, if ever made, must be considered void *ab initio*, inasmuch as the original grant of the lands was in the nature of a *wuqf*, or pious endowment, and could not consequently be appropriated to personal emolument, or in any manner diverted from the purposes for which it was primarily intended. In support of this plea, the defendant produced the royal grant dated the 1st *Jumadee ooluwul* 1089, A. H., or the 21st year of the reign of Aulumgeer, in which it was declared, that the mouza of Bishenpoor should thenceforward be exempted from the payment of revenue; that the produce arising from its lands should be applied to the support of religious mendicants and students, and to the repairs of mosques and other public edifices; that the general superintendence of its resources should be confided to Durveish Hoosein, and should remain vested in him, his heirs, and successors, for ever. Several witnesses were called, who deposed that from the year 1198, the collections of the whole mouza had been made by Moolla Futhoodeen, and a *cubool-eet* or engagement was also adduced, entered into by Jynarain Mullick, dated the 17th of *Asarh* 1206, in which he acknowledged the fifty beegahs in question to be the *muddud mash* property of the aforesaid Moolla, and agreed to take them in farm for the period of seven years, at a fixed annual rent of 71 rupees. The Zillah Judge was of opinion, that the gift alleged to have been made by Moolla Futhoodeen had not been proved; and that even if made, it could not be held valid, the lands appearing, from the terms of the grant, to be of an unalienable nature. The claim therefore was dismissed with costs. On appeal from the above decision to the Provincial Court of Calcutta, the Second Judge held it to be just; but the First and Third Judges were of a different opinion. They considered it proved by the evidence of the witnesses adduced by the appellant in the Zillah Court, that Vipra Pershaud, Gooroo Pershaud, and their father, were in possession of the lands in question for a period of thirty years; that the alleged gift was consequently inferrible, and that the subsequent sale made by them to the appellant was clearly established. The law officer of the Provincial Court being called on for an explanation of the rules observed with respect to property acquired by royal grant, declared that it was alienable at the pleasure of the grantee or his successors, provided there was no mention made in the grant of "*wuqf*," notwithstanding the specification in the deed of the purposes to which it should be appropriated and the persons by whom it should be held. The decision of the Zillah Court was therefore reversed, and profits from the date of the dispossession were awarded to the appellant. A special appeal being preferred to the Court of Sudder Dewanny Adawlut from the above decree, that Court admitted it, after having taken a *futwa* from their law officers, who declared that the appropriation of land, or other property, to pious and charitable purposes, is sufficient to constitute *wuqf*, without the express use of that term in the grant; and that the alienation of such property from the purposes intended is illegal.

1814.

Knib Ali
Hoosein, v.
Syf Ali.

1814. The Court (present J. H. Harington and W. E. Rees), relying on the law, as exposed in this *futwa*, and being satisfied that the royal grant adduced by the appellant was genuine, as well from its internal marks of authenticity, as from an inspection of the *bazee zumeen dufter* (from which it appeared that the grant was confirmed to the appellant's father by Government in the year 1784) and the respondent not having been able to produce any title of proprietary right to the lands, on the part of those from whom he had made the purchase, the decision of the Court of Appeal was reversed, and that of the Zillah Court confirmed. The respondent was directed to refund to the appellant whatever costs the latter might have incurred in the Provincial Court; and the costs in the Sudder Dewanny Adawlut were made payable by the parties respectively.

1814. MIHR ALI and SUKEENA BEGUM (Paupers), Appellants,
versus
 April 28th. KUREEMOONISA BEGUM and LOOTF ALI, Respondents.

The Moo-
sulman law
presumes a
marriage
between
parties
who live to-
gether as
man and
wife, and
nothing
appears to
invalidate
that pre-
sumption.
A son born
under such
circum-
stances,
inherits
equally as
a son born
in proved
wedlock,
and is not
divested of
his right as
one of the
heirs to the
estate of
his pater-
nal uncle,
though dis-
carded by
the latter.

KIRAMOODEEN ALI KHAN, the husband of Kureemoonisa, sued his half brother, Mouzim Ali Khan, on the 19th of April 1793, in the Zillah Court of Behar, for the proprietary right to a 4 ana share of a pergunna comprising Suresee and other *lakhraj* villages. The decennial produce was estimated at 12,000 rupees. It was set forth in the plaint, that the villages in dispute formed a part of the *muddud mash* property of Asudoollah Khan, who died childless, leaving as his heirs the plaintiff and Mouzim Ali (the defendant), sons of his brother Mookrim Ali Khan; and Iseen Ali Khan and Himayut Ali Khan, sons of Shah Ilahee, another brother. That the three last mentioned heirs divided the estate among themselves; the defendant taking an eight ana share, thereby appropriating to himself the portion of the plaintiff. That the plaintiff, at the period of this partition, was absent at Benares, but that on his return, he remonstrated, and obtained from his half-brother a written agreement to surrender a three ana share; but that the terms of this compromise not having been fulfilled, he had been induced to sue for the recovery of his entire right. In the mean time Mouzim Ali died; and his heirs, namely, Meer Lootf Ali and Meer Toorab Ali, his sons; Meer Mihr Ali his grandson, and Zeinub Begum and Sukeena Begum his daughters, became the defendants in the suit. They alleged, in answer, that the plaintiff's mother was merely a concubine of his father, on whose death she had been, on that very account, discarded and sent away, together with her son by Asudoollah Khan; and that the plaintiff, not having been born in wedlock, was incompetent to inherit. That the compromise alluded to by the plaintiff had never been made; but that Mouzim Ali agreed to give him a two ana share, provided he gave up the sum of 25,000 rupees, being half the amount of property, either in money or jewels, received by the mother of the plaintiff from Mookrim Ali. The Zillah Judge was of opinion from the evidence,

that the claim of the plaintiff was not admissible in its full extent; and that the alleged compromise for a three ana share was not proved; but as the document containing the agreement of Mouzim Ali for a two ana share, was duly authenticated and admitted by the defendants; and as that containing the condition, purporting to have been executed by the plaintiff, was not proved, and its validity was doubtful; a decree was passed, awarding a two ana share of the estate, unconditionally, to the plaintiff. The costs were made payable by the parties in proportion to their interests in the suit respectively. Three of the defendants, namely, Mihr Ali, Sukeena Begum, and Lootf Ali, being dissatisfied with the above decision, preferred an appeal to the Provincial Court of Patna; but that Court were of opinion that the appellants, by acknowledging that the respondent was a son of Mookrim Ali, had virtually admitted the justice of his original claim; as by the Moohummudan law, all the brothers are entitled to equal participation in the inheritance. The decree of the Zillah Court was therefore amended, and the whole amount of the original claim, namely, a four ana share of the estate, was awarded to the respondent. A further appeal was preferred to the Sudder Dewanny Adawlut by Mihr Ali and Sukeena Begum, but the original Plaintiff having died in the interim, his interest devolved on his widow Kureem-moonisa, with whom Meer Lootf Ali sided as nephew, and joint heir with her to her late husband. The following questions were proposed to the law officers of the Sudder Dewanny Adawlut: 1st, A person of the Moosulman faith dies leaving two sons, one by a wife, the other by a concubine. In this case has the latter son any right of inheritance to his father's property? If he has, does he obtain an equal share or not? 2d, The second son mentioned in the foregoing question, born of a concubine, sues his brother for a share in the property of his deceased uncle; the brother answers the claim by asserting that the uncle aforesaid discarded the plaintiff's mother. Is such an act a legal bar to his sharing the inheritance or not?

The law officers delivered a *Futwa* to the following effect: 1st, The term "wife" appears to intend one married publicly, in the presence of witnesses, or whose marriage is proved by acknowledgment; and the word "concubine" to intend one whose nuptials have not been celebrated in a formal manner; but who, residing in the house with a man, is generally believed to be his wife. The son born of the last mentioned woman is held to be the son of that man; has a right in his estate, and takes just as much of it as the son of a wife publicly married. 2d, Should the aforesaid son be discarded, together with his mother, by his uncle, that is no bar to his sharing the inheritance. After considering the above exposition of the Moohummudan law, and taking evidence which proved that the mother of Kiramooddeen Ali Khan lived constantly in the same house with his father, and was generally believed to be his wife, the Court of Sudder Dewanny Adawlut (present W. E. Rees) were clearly of opinion, that his right to an equal participation in the estate was established. The decree of the Provincial Court was therefore affirmed, and the costs of appeal were made payable by the appellants.

1814.
Mihr Ali
and Sukeena
Begum,
v. Kureem-
moonisa
Begum and
Lootf Ali.

by the heir
brother
entitles to
inheritance.
See Hamilton's
Heir, page
172, vol. 3.

1814.

June 24th.

RUNGLAL CHOWDHRY, Appellant,

versus

RAMANATH DASS, Respondent.

The *mocuddumee* tenure in Zillah Bhaugulpore adjudged to be separable, as a proprietary estate, (under sections 4 and 5, regulation 8, 1793,) from the *chowdhraee* to which it had been heretofore annexed.

THIS was a suit brought by Runglal Chowdhry in the Zillah Court of Bhaugulpore, on the 11th of June 1804, against Ramanath Dass, to recover 38 villages (*assilce* and *dakhal-e*) of which the annual profit was estimated at 6,006 rupees. The plaintiff sued on the grounds that the *tuppeh* Nvadesh, in pergunnah Bhaugulpore, consisting of 162 mouzas, was his ancestral property; that the defendant, the *mocuddim* (an officer who like the *putwaree* was stated to be merely a servant of the *choudhry* or *zimeendar*) of 38 of those villages, in the year 1207 F. S. by fraudulent means, obtained from the Collector a pottah, entered into engagements with him for them, and separated them from his (the plaintiff's) *chowdhraee*, thereby depriving him of his rightful possessions. The defendant denied that the contested mouzas were the ancestral property of the plaintiff, and stated that the Collector in 1207 F. S., being about to conclude the settlement of the pergunna, was required by the Board of Revenue to make the settlement with every *malik*; that he accordingly obtained his pottah and paid the rent due on the lands; that under similar circumstances the settlement of 17 mouzas was concluded with the plaintiff, which lands were afterwards sold in satisfaction of the dues of Government; that the contested lands, which formed his *mocuddumee* were purchased by him from Meer Buhadoor Alee, who was (as his ancestors had been before him) *mocuddim* of those lands. In proof of his allegations, he produced deeds of sale executed by the last named person, and the pottah received from the Collector. The Zillah Judge passed a decree in favour of the defendant for the reasons which follow: The plaintiff did not prove that he had been ousted from the lands by the defendants; the defendant established in a satisfactory manner his purchase of them from the late *mocuddim*, Meer Buhadoor Alee; the Collector, considering all such *mocuddumee* tenures separable from the *chowdhraee* or *zemindaree*, under section 5, regulation 8, 1793, made the settlement with the defendant; the Moorshedabad Provincial Court, on a former and similar occasion, admitted the right of a *mocuddim* to hold his lands as a separate tenure from the *chowdhraee*. Under the above circumstances, the suit was dismissed with costs. On appeal by the plaintiff to the Provincial Court of Moorshedabad, that Court, on the 12th of January 1809, affirmed the decree of the Zillah Court, and dismissed the appeal with costs. The plaintiff having sued in the Courts below as a pauper, and having estimated the annual produce of the lands in dispute at rupees 6,006, whereas, in point of fact, it did not exceed the sum of rupees 450, he was considered as wilfully litigious, and sentenced by each of those Courts to three months imprisonment, in consideration of his non-payment of costs. On a further appeal by the appellant to the Sudder Dewanny Adawlut, that Court (present J. H. Harington and J. Fombehe) confirmed both of the above decisions, and pronounced their opinion in substance as follows, viz. "With

respect to 8 *assilee* and 4 *dakhilee* villages, the title deeds exhibited by the respondent being sufficient to prove that he was *malik* of them, and it having been before decided by the Court that a *mocuddim* in Bhaugulpore, appearing to be the *malik* of the villages composing his *mocuddumee*, is entitled to be considered an actual proprietor of land, under the provisions of regulation 8, 1793, no doubt exists regarding his rightful possession of them; but, with respect to the remaining 26 mouzas, the bills of sale which he alleges to have received for them, not being forthcoming, the question now appears to be, whether the *mocuddumee* tenure in Zillah Bhaugulpore, without proof of the *mocuddims* holding any distinct title as *malik*, be separable as an independent estate under sections 4, and 5, regulation 8, 1793, from the *chowdhraee* to which it may have been heretofore annexed, or whether it is to be considered a dependent tenure, and left under the *chowdhry* in pursuance of sections 6, 7, 8, of that regulation. The defendant has established his proprietary right to 12 of the mouzas, which affords a presumption of his right as *mocuddim* to the remainder of them; the plaintiff having preferred his suit against him, for the recovery of the whole thirty-eight villages indiscriminately, and not having adduced any evidence in support of his plea, that the defendant held his lands as a servant at the pleasure of the *chowdhry*. The Court also find, from evidence adduced in another cause, decided by the Moorshedabad Provincial Court, between a *chowdhry* and a *mocuddim* in the same pergunna, (in which a decree was passed in favour of the defendant, he having purchased his *mocuddumee* tenure from the former *malik*,) that the *mocuddims* of the mouzas in the greater number of the pergunnas of Bhaugulpore are entitled to all the privileges of *maliks* in the other zillahs of Behar, that their possessions are hereditary, that they do not hold their lands under pottahs from any zemindar or *chowdhry*, and that their *mocuddumee* tenures have existed from time immemorial, in common with the *chowdhraee*, and are equally hereditary and transferable; that the *mocuddims* moreover exercise a full right of property in selling the lands of their *mocuddumee* villages by regular bills of sale, which, in several instances, have been attested by the *chowdhry*, and which bills expressly declare the proprietary right of the seller to be transferred to the purchaser; that the interest of the *mocuddim* in the lands which compose his tenure, appears to be greater than that of the *chowdhry*. It appears also, from the evidence of several witnesses, that for some years antecedent to the permanent settlement, when the lands were let in farm or held *khas* by the officers of Government, the usual *malikana* allowance of 10 per cent, was equally divided between the *mocuddim* and *chowdhry*. It further appears, from the report of the Assistant Collector of Bhaugulpore on deputation at Monghyr, dated 11th of August 1790, that the *mocuddim* receives from the ryots, of the produce appropriated for the maintenance of those officers, both in kind and in money, a share greater than that of the *chowdhry*, in the proportion of four to one, and that this allowance is also termed *malikana*; and is the portion of gross produce from time immemorial allotted to the proprietor or officer called the *mocuddim*, who is also styled the

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1814. *malik mocuddim*. The respondent's right of possession in these lands is fully proved, and the appellant's pleas for incorporating with his *choudhraee* the *mocuddumee* tenure of the former, are wholly unfounded. It is therefore ordered, that the decrees of the Zillah and Provincial Courts be confirmed, and the appeal dismissed." The Court, however, considering, that the rights of *mocuddims* had not before been ascertained, and seeing that the defendant could not shew any title deeds for the most of his lands, did not deem the appeal litigious or improper, so as to call for any further confinement of the appellant, in the event of his not discharging the costs adjudged against him. (a)

1814. SUMRUN SINGH and Others, Appellants,
versus
 June 27th. KHEDUN SINGH and HURLAUL SINGH, Respondents.

Sons by different mothers inherit equally according to the Hindoo law. A distribution among them is to be made not with reference to the mothers, but with reference to the number of sons. In cases of inheritance *koolchar* or family usage has the prescriptive force of law; but to establish *koolchar* it is necessary that the usage have been ancient and invariable.

RUTTUN SINGH, the proprietor of an eight ana share of an estate consisting of mouzas Khoobanpoor, &c. had two wives. By the first wife he had three sons, namely Ghunesyam Singh, Sumrun Singh and Bhugwunt Singh. By the second he had one son, Dyaul Singh, who was the father of Khedun Singh and Hurlaul Singh, plaintiffs in the present action. The defendants were Sumrun Singh and Bukhtwur Singh, Gujraj Singh, Nurindur Singh and Byjnath Singh, surviving sons of Ghunesyam and Bhugwunt Singh. It was set forth in the plaint, (adduced in the Zillah Court of Tirhoot on the 15th of August 1805,) that after the death of Ruttun Singh, the father of the plaintiffs, on account of the numerous disputes which occurred between the families, separated from his half brothers, and took, with their consent, as his share, a moiety of the personal property, in right of his mother; the landed property remaining undivided, and the management of it being entrusted to Sumrun Singh. That shortly after the above separation, the father of the plaintiffs died, and they being minors at that period, the care of their portion continued with Sumrun, who, now that they had arrived at years of maturity, refused to account to them for the profits, or to surrender up his trust. The defendants, in answer, pleaded, that the father of the plaintiffs having been unwilling to contribute to the liquidation of certain arrears of rent which had accrued on the estate, and finding the concern rather unprofitable, had voluntarily renounced all interest in it. This plea however was not by any means established, and the Zillah Judge being of opinion, that the plaintiffs, in right of their grandmother and father, were entitled to a moiety

(a) For more detailed information of the grounds on which the judgment of the Sudder Dewanny Adawlut was given in this case, and especially for the necessary distinction to be observed between the *malik mocuddims* of Zillah Bhagulpoore and other parts of the Province of Behar, and the *mundal mocuddims* of Bengal; (who are only the chief ryots of their respective villages;) see Minute of the Chief Judge (Mr. Harington) containing his opinion in the case above reported, and printed in the third volume of his *Analysis of the Laws and Regulations*, pages 391 to 395.

of the landed estate (the annual produce of which was estimated at 505 rupees), decreed to them that portion accordingly; with costs against the defendants. An appeal being preferred to the Provincial Court of Dacca, that Court confirmed the decision of the Zillah Judge. Sumrun Singh and his partners subsequently petitioned the Sudder Dewanny Adawlut for the admission of a special appeal in this case; alleging, that the decision of the inferior Courts, however just it might seem with respect to the facts deduced from the evidence, was legally wrong in upholding the claim of the plaintiffs to a moiety; the Hindoo law requiring that the shares of sons by different mothers should be regulated according to the number of the sons, not according to the number of the mothers; and as in the present case there were four sons, including the father of the plaintiffs, it followed that his share of the estate amounted but to a quarter; to which alone the plaintiffs could possibly have any claim, it being evident, that they were entitled to no more than their father's share. A special appeal having been admitted, the respondents pleaded the peculiar usage of their family, which, they averred, was sufficient to regulate the mode of succession: and they adduced two instances, in which the distribution had been regulated by the number of wives, without any reference to the number of sons that they had borne respectively. The proceedings in this case were delivered to the *pundits* for an exposition of the Hindoo law, and from their written opinion, it appeared, that the mode of distribution adopted by the Zillah and Provincial Courts was illegal, and that to legalize any deviation from the strict letter of the law, it is necessary that the usage should have been prevalent during a long succession of ancestors in the family, when it becomes known by the name of *Koolachar*. In support of these opinions the following texts of *Vrihaspati* and *Catyayana*, were cited; "Where there are an equal number of sons born of two or more different wives, equal in degree, the distribution is to be regulated according to the mothers; but where the numbers of the sons (by different wives), is unequal, the distribution is to be regulated by the number of sons." "Where a usage is hereditarily and scrupulously adhered to, it acquires the appellation of a duty; and must be adhered to." On receiving the above exposition of the law, the First and Second Judges of the Sudder Dewanny Adawlut, who tried the appeal, were clearly of opinion, that the plaintiffs had not proved such a usage as is required to justify a deviation from the Hindoo law of inheritance, and that they could recover a quarter only of the landed estate; that being the portion to which their father (as one of four sons) was legally entitled. The decrees of the Zillah and Provincial Courts were therefore amended; and a two ana share of the zemindaree was awarded to the plaintiffs. The costs were made payable by the parties respectively.

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others, v.
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Hurlaul
Singh.

1814. **RAMINDUR DEO RAI** (Brother and Heir of **RAJINDUR DEO RAI**, deceased), Appellant,
 Aug. 5th. *versus*
ROOPNARAIN GHOSE, PEETUMBER GHOSE, and KISH-ENMOHUN BUNHOOJEA, Respondents.

A, being indebted to **B**, grants him a mortgage of his estate (antedating the mortgage deed eight years) together with a bond conditioned for the payment of the debt by yearly instalments, and a warrant of attorney to confess judgment. **A**'s estate being attached by Government for arrears of revenue, and several instalments due on the bond being unpaid, **B** caused judgment to be entered up in the Supreme Court on his bond and warrant of confession, and sued out execution under which the lands were sold by the sheriff at public auction and purchased by **C**, who afterwards

BANARASEE GHOSE, father of Roopnarain Ghose, one of the respondents in this Court, obtained a decree in his favour in the Dewanny Adawlut of Zillah Jessore, dated the 16th of September 1789, for sicca rupees 50,000 against the late Rajah Govind Deo Rai, father of Ramindur Deo Rai the appellant, payable by instalments in ten years. An adjustment of accounts taking place between the parties on the 17th of July 1798, it appeared that a balance of sicca rupees 42,000 was due on the decree above-mentioned, from Rajah Govind Deo Rai to Roopnarain Ghose, son and heir of Banarasee Ghose, who had died in the interim. On that date, Rajah Govind Deo Rai granted a mortgage of his estate, and executed a bond for that sum, accompanied by a warrant of attorney to confess judgment, to Roopnarain, associating with him one Hugh Darley, a British subject, thereby rendering himself amenable to the jurisdiction of the Supreme Court, in all matters relating to the said bond; which further stipulated, that the amount should be liquidated by specific instalments, in twelve years, and that on failure in the payment of any one instalment, the bond should be immediately enforced for the whole amount. The Rajah failed in the discharge of the stipulated payments of the bond, and suffered his lands to be attached by Government for sale, in discharge of a heavy balance of revenue; in the mean time judgment was entered up by Roopnarain Ghose, and a writ of *fieri facias* issued out of the Supreme Court. Application was made by the Rajah to delay the sale of his lands, that he might procure time to discharge the levy endorsed on the writ, which application was complied with, but to no effect; and the estate was therefore publicly sold by the Sheriff on the 31st of July 1800, to Peetumber Ghose, in presence of the Rajah and his sons, for sicca rupees 51,000. Of this purchase money the sum of 27,000 rupees was paid to Government in satisfaction of arrears of revenue, for which the estate was under attachment by the Collector. Peetumber Ghose, however, after having obtained the bill of sale from the Sheriff, finding himself incapable of managing a landed estate, disposed of it by private contract to Kishenmohun Bunhoojea, who had, since the year 1800, been in peaceable possession of the land, enjoying the profits and paying the revenue to Government in the name of Peetumber Ghose. Rajah Govind Deo Rai died in the year 1806; and the present action was brought in the Zillah Court on the 11th of March 1807, by his son Rajindur Deo Rai (and continued after his death by Ramindur Deo Rai), against the three respondents, on the ground of a secret engagement alleged to have been executed on the 17th of July 1798, by Roopnarain Ghose to Rajah Govind Deo Rai, reciting, that he (Roopnarain Ghose) had taken from Rajah Govind Deo Rai a mortgage deed of his estate and a bond, together with a warrant of attorney

to confess judgment, under pretence of satisfying a decree for the sum of 50,000 rupees passed in favour of his late father Banarasee Ghose in the year 1196, B. S., (corresponding with 1789, A. D.) but in reality to save the estate from falling into the hands of certain creditors of Rajah Govind Deo, to whom the lands had been mortgaged, and who threatened to take possession at the expiration of the time limited in the mortgage deeds. The agreement went on to state, that to effect this purpose, the feigned mortgage granted to Roopnarain was antedated eight years; that notwithstanding the mortgage was feigned, yet there was in reality due the sum of 42,000 rupees, according to the bond; that the estate should not be sold under the bond, even although the stipulated instalments should not be paid regularly; that the instalments in arrear should bear interest, and that nothing less than a failure to pay the amount of the debt after the expiration of twelve years (in which event it was declared that the agreement was to be avoided), should induce him (Roopnarain) to take out execution under the bond and warrant of confession, for the satisfaction of his debt; that should the other creditors, to whom portions of the land had been mortgaged, refuse to enter into any compromise, and should the Rajah, wishing to defeat their object, or on any other account, desire him so to do, he (Roopnarain) would cause the estate to be sold by virtue of the instruments lodged with him, would purchase it in his own name or in that of one of his dependents, and would cause it to be made over to Rajah Govind Deo's son, to whom he would look for satisfaction of his debt.

In the year 1802, Peetumber Ghose had sued one Ghureeb Oollah to recover a certain portion of land, which, he alleged, appertained to the estate purchased by him at public auction. The defendant in that suit pleaded the previous mortgage, but the Zillah Judge, on the ground of the mortgage having been granted while the estate was under attachment, held that plea to be unavailing, and gave judgment in favour of the plaintiff. The case, however, having been appealed to the Provincial Court, and subsequently to the Sudder Dewanny Adawlut, the decree of the Zillah Judge was reversed by both those Courts. It appeared to the Provincial Court, that the mortgage deed executed to Roopnarain was antedated for the purpose of defrauding other mortgagees, and was not a *bond fide* transaction; that the instruments therefore under which the Sheriff's sale was made were fictitious, and that Peetumber's purchase was consequently void. The Sudder Dewanny Adawlut, further considered it to be established, that the attachment for arrears of revenue, which was out against the estate at the time when the mortgage was granted to the appellant, had been withdrawn, and that the ultimate sale had been made entirely on a different account. Besides the agreement alleged to have been entered into by Roopnarain, copies of the decrees of the Provincial Court and Sudder Dewanny Adawlut, passed against Peetumber Ghose in the cause above noticed, were filed in support of the present claim.

The defendant, Roopnarain, alleged in reply, that the agreement

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sold them by private contract to D. Seven years afterwards, A, having died, his son and heir sued B, C and D, to recover the lands, on the plea that the mortgage to B. by A. was fictitious, and granted with the view of screening his property from other creditors, and that B. had executed an engagement to the above effect; promising that should he cause the estate to be sold under the deeds in his possession, he would himself become the purchaser, and cause it to be transferred to the son of A. Determined that the engagement (if proved) being intended to defeat the rights of third parties, cannot avail A or his representatives

1814. brought forward by the plaintiff, and stated by him to have been executed by him (the defendant) was a fabrication, that no such agreement had ever been entered into, that the plaintiff's father was *bonâ fide* his debtor, and had consequently executed the deeds under which his estate had been sold by auction; that he (Roopnarin), so far from having been a gainer in the transaction, had lost a very considerable sum; having received only about 24,000 rupees in payment of his debt of 42,000, the remainder of the purchase money being applied to the liquidation of the arrears of public revenue which had accrued on the estate. The defendant, Peetumber Ghose, pleaded that his purchase had been made fairly and openly at public auction, and that the decision against him in favour of Ghureeb Oollah's right to a portion of the lands could not affect his right to the remainder. The defendant, Kishenmohun, pleaded that he could not in justice be called upon to answer the demands of the plaintiff, as he had purchased the estate at its auction price from Peetumber Ghose, in whose name he had peaceably held it for seven years, and that the plaintiff's father, although alive six years after the transfer, had never objected to it. The Zillah Judge, considering the former decision against Peetumber Ghose as rendering the Sheriff's sale null and void, to be good evidence against his (and *à fortiori* against Kishenmohun's) right to the estate, and the agreement filed by the plaintiff to amount to a defeasance of the bond, gave judgment in favour of the plaintiff with costs against the defendants. An appeal against the above decision having been preferred by the defendants to the Provincial Court of Appeal, that Court, under date the 29th of September 1809, passed a decree entering fully into the merits of the case, but finally determining, that as the bond executed by the late Raja Govind Deo Rai, cognizable only in the Supreme Court, was the ground of the action, the case was cognizable in that Court only; and that, consequently, the Zillah Judge should have nonsuited the plaintiff, and referred him to the Supreme Court for redress. The decree of the Provincial Court of Appeal therefore maintained the possession of Kishenmohun Bunhoojea, under his purchase from Peetumber Ghose, the purchaser at the Sheriff's sale. An appeal having been preferred to the Sudder Dewanny Adawlut against the above decision of the Provincial Court, it became necessary to determine, in the first instance, whether the case was cognizable in the local Courts, or in the Supreme Court only. A question on this subject having been put to the Advocate General, he declared his opinion to be as follows: "The country Courts cannot directly question a judgment of the Supreme Court which, if erroneous, can only be rectified upon an appeal to the King in Council; but the country Courts, as well as the Supreme Court, can, upon collateral grounds, which formed no part of the subject matter of the case or suit upon which the judgment was obtained, control the parties who may have obtained the judgment when subject to their respective jurisdictions." On a mature consideration of the question, the Second Judge was of opinion, that the validity or invalidity of the sale by the Sheriff, under the bond executed by the late Raja Govind Deo Rai, not only did not form the ground of the present action, but ought to

against B,
much less
against C
and D, who
were pur-
chasers for
a valuable
considera-
tion, with-
out notice.

Although
the coun-
try courts
cannot
directly
question a
judgment
of the
Supreme
Court, yet
they can
upon col-
lateral
grounds
not before

be considered as having no relation to it. It appeared to the Second Judge that the action was solely and exclusively founded upon the secret engagement, alleged to have been executed by Roopnarain Ghose to the late Rajah Govind Deo Rai, under date the 17th of July 1798, which not only formed no part of the subject matter of the case determined by the judgment and sale of the estate by the Supreme Court, but was even concealed from the knowledge of that Court and its officers; that consequently, the subject matter of the said engagement being within the jurisdiction of the Country Courts, the opinion delivered in the decree of the Provincial Court, that the case was only cognizable by the Supreme Court, was erroneous, and that therefore, that part of the decree should be reversed. The Chief Judge entirely concurring in opinion with the Second Judge, on the point above mentioned, that part of the decree of the Calcutta Provincial Court which declared the case not cognizable in the local Courts was reversed, and the appeal being admitted, the Court proceeded to a consideration of it. The pleas of the appellant in the Sudder Dewanny Adawlut were similar to those adduced by him in the Zillah Court, he, resting his claim chiefly on the agreement alleged to have been entered into by Roopnarain, and on the judgments given against Peetumber Ghose. The respondents, in answer, filed a written opinion of the Advocate General, respecting the grounds on which the appellant rested his case, which document they had procured from that officer for the purpose of refuting the claim brought against them. The opinion was delivered in the following terms: "There is no objection to Ramindur Deo's suit on the ground of jurisdiction. It is not brought to set aside the judgment of the Supreme Court, but to have a relief, which in itself is consistent with the judgment, and which might be given to him by the Zillah Court, if he were entitled to it at all. I am clearly of opinion, that, as heir of Govind Deo, he cannot be allowed to avail himself in any Court of the alleged agreement (admitting it to be genuine) against the title of Kishenmohun Bunhoojea, or of Peetumber Ghose, supposing either of them to have been purchasers for a valuable consideration, without notice. It is a general principle of law, that a man entering into a fraudulent agreement with another of this nature, to defeat the rights of third parties (creditors for instance) shall not himself or his representatives, be relieved against the consequences of his own fraudulent act, though the creditors may. And if his partner in the fraud takes advantage, ever so dishonestly, of the power which has been put into his hands, a Court of justice will not interfere on behalf of him or his heirs. If this holds in the case of the immediate party to the fraud, it holds much more strongly in the case of a person purchasing under him for a valuable consideration, upon the faith of a title apparently good, and without any knowledge of the secret agreement by which it was intended to be rendered unavailable: nothing can be clearer than that as against persons so purchasing, this sort of agreement ought not to prevail. I am of opinion, that the decrees in the cause of Peetumber Ghose *versus* Ghureeb Oollah, ought not to have been received as evidence in the suit of Raj Indurdeo against Kisha-

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brought forward, control the parties who may have obtained the judgment.

1814. **Ramindur Deo Rai, v. Roopnarain Ghose, Peetumber Ghose and Kishenmohun Bunhoojea.** mohun Bunhoojea; because Kishenmohun was not a party to the former suit, and it seems from the dates, to have been instituted, or at least the decree to have been passed, long after Peetumber Ghose had sold the lands to Kishenmohun. In giving this opinion, I take it for granted, that Peetumber Ghose was the real plaintiff in the suit against Ghureeb Oollah, for if his name was only used, and Kishenmohun was the real plaintiff, then the proceeding in that suit would be evidence in this suit against Kishenmohun. Supposing, however, that upon this ground, the proceedings were admissible as evidence, I do not see that any thing in those proceedings could materially affect the question in this suit, for the utmost that the decree of the Court of Appeal goes to, is to cast a discredit on the title under which Peetumber purchased, but as that discredit arises from the fraud of Govind Deo, and his supposed contrivance to cheat his creditors, it cannot, for the reasons above noticed, affect Kishenmohun's title in a suit by the heir of Govind Deo Rai; and it is to be observed, besides, that the Sudder Dewanny Adawlut finally decided the suit of Peetumber Ghose against Ghureeb Oollah, not upon the goodness or badness of the mortgage purporting to have been executed in the year 1197, B. S., or 1790, A. D. (which, whether good or bad, is but indirectly connected with the judgment) but upon the priority of Ghureeb Oollah's mortgage to the Sheriff's seizure under Roopnarain's judgment; and that ground of decision has manifestly nothing to do with the question in the present suit." In conformity with the foregoing opinion, and on a full consideration of the case, the Court of Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) affirmed the decree of the Provincial Court, as far as it went to maintain the possession of Kishenmohun Bunhoojea under his purchase from Peetumber Ghose, the purchaser at the Sheriff's sale, observing that their decree in favour of Ghureeb Oollah was founded on his having a previous mortgage of that portion of the estate which was decreed to him, and by no means affected the validity of the sale of the remainder, and that the agreement on which the original plaintiff rested his claim, being founded on a fictitious and fraudulent mortgage deed, antedated eight years prior to the date of its actual execution, for the purpose of defrauding previous mortgagees, would not, even if proved, have benefited the late Rajah Govind Deo Rai, if an attempt had been made to take advantage of it during his life time; and consequently could not benefit his legal representatives. The Court remarked, for the information of the Provincial Court, that, having determined that the plaintiff could only have recourse to the Supreme Court for redress, it was unnecessary in them to have entered fully into the merits of the case, or to have recorded their opinion against the validity of the claim.

RAM GOVIND SINGH, Appellant,

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versus

BAICHTHA RAM GHOSE, (Son of RAMKUNHAI GHOSE,
deceased), Respondent.

Aug. 13th

THIS was a suit brought by the appellant in the Zillah Court of A, enters Nuddea (but afterwards removed to the Provincial Court of into a Calcutta) on the 27th of September 1807, against the late Ram- written en- kunhai Ghose, to recover possession of the talooks Bukhsheepoor, to B, for gement &c. The estimated annual produce, according to the bill of plaint, the sale of amounted to 31,000 rupees. The plaintiff claimed by right of his estate, on purchase, setting forth in his plaint, that, on the 21st of Assin condition of 1214, B. S., the defendant agreed to sell him the talook of Bukh- receiving the whole sheepoor, &c. for 41,000 rupees, and after having taken 2,000 amount of rupees as earnest money, and caused 500 rupees more to be paid the pur- chase to his son Baichha Ram, executed an engagement in his favour, money by a in the following terms: "I, Ram Kunhai Ghose, possess in Zillah specified Nuddea the talook Bukhsheepoor, the *malgoozaree* of which amounts period, and to 19,802 rupees, 3 anas, 14 gundas; I am also *benamee* proprietor in that case in the same same zillah under the name of Bunshedhur Mir of engages to execute a the village of Mohesh Kunda, the *malgoozarce* of which is 5,597 regular bill rupees, 10 anas, 6 gundas. In the zillah of Moorsheabad, of sale. A receives I am *benamee* proprietor, under the name of Radhakaunt Ghose, part of the of the village Purtabpoo, of which the *malgoozaree* is 400 rupees, purchase 13 anas, 17 gundas. I have sold you these my possessions at the money, and price of 44,001 rupees, and have received 2,000 rupees as earnest B tenders money. I will upon receiving the remainder of the purchase the remain- money within five days, execute and cause to be registered a *qabula* the exira- (or bill of sale) in your favour. Should you, within the above tion of the specified period, be unable to pay the remainder of the purchase specified period. A, money, this engagement will be of no avail, and you will besides however, forfeit the earnest money. I have given this engagement for the refuses to sale of the talooks on the 21st of Assin 1214, B. S." The plaintiff abide by the further alleged, that he took the remainder of the purchase money terms of to the defendant's house, and tendered payment of it to him his engage- within the period specified in the engagement; that the latter ment. At the suit of declined receiving it, and made excuses for not executing the bill B, the con- of sale in his favour. The defendant admitted in his answer, that ditional sale was he had executed the engagement stated by the plaintiff, and had held to be received from him rupees 2,000 as earnest money, but averred, conclusive that he never had any real intention of selling his lands to the against A, plaintiff, but merely granted the said instrument for the purpose although of frightening his son (to whom he had on a former occasion on the engage- account of bodily infirmity, entrusted all his property) into provid- ment did not con- ing him with a sum of money, adequate to enable him to undertake tain any a pilgrimage to Benares, which his son had at various times refused express to grant; and that the plaintiff had refused to receive back the condition that it earnest money when offered by him. The Provincial Court of should be in Moorsheabad passed a decree in favour of the defendant, reciting considered in substance as follows: "The plaintiff, in support of his claim, sufficient has established merely the execution of an engagement by the to consti- tute an ac- defendant, and the advance of 2,000 rupees, but the said engage- tual sale.

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Ram Govind Singh,
v. Baichha Ram Ghose.

ment is for many reasons insufficient to establish the sale, for it does not contain any such condition, as that if the plaintiff should within the limited time tender payment of the remainder of the purchase money, and the defendant should decline receiving it, the engagement should be considered conclusive as to the sale, without the execution of any other instrument. The payment of rupees 500, alleged by the plaintiff to have been made to the defendant's son is totally incredible, for Baichha Ram has sole controul over his father's affairs, in consequence of his infirmity; and if the plaintiff had really paid him that sum, he would have put it to account of the purchase money, and would have procured the son's signature to the engagement, or would have taken a separate receipt for it. The fact of that not having been done, tends to invalidate the engagement, and to falsify the allegation of the plaintiff, and it does not appear possible, that the deed could have been executed with the knowledge of the defendant's son. The occasion of the execution of the deed is apparent from the answer of the defendant, and other circumstances attending the case, viz. that it was all a trick devised merely to frighten his (the defendant's) son into the advance of money, for the purpose of defraying his expences on the road to Benares. It is therefore decreed, that the claim be dismissed, but that the defendant restore the sum of rupees 2,000 earnest money, without interest, which is considered as forfeited by the plaintiff's refusal to take back the money when tendered to him by the defendant." An appeal was preferred by Ram Govind Singh from the above decree to the Sudder Dewanny Adawlut, the appellant maintaining his right to the lands in virtue of the engagement. The Court required him to deposit the remainder of the purchase money, and on a consideration of the case, reversed the decree of the Provincial Court for the reasons which follow: Ram Kunhai Ghose (since deceased and succeeded by his son Baichha Ram) admitted in his answer, that he received 2,000 rupees as earnest money from the plaintiff, and that he executed an engagement in his favour, to sell to him the contested lands, under certain conditions, which the latter fulfilled. The defendant was unable to support the averment that the contract was fictitious, either by oral evidence or by any document under the plaintiff's hand, declaratory of the same. Witnesses proved that the deed was executed in the presence of both father and son with their entire consent. The intention of the parties, with regard to the conditional sale, was quite apparent from the words of the contract, and it appeared to the Sudder Dewanny Adawlut that the omission of the condition mentioned in the decree of the Provincial Court did not render the performance of the contract voidable by the respondent. It was ultimately decreed, therefore (present J. H. Harington and W. Rees), that the contested lands specified in the engagement forming the estate of the respondent, should be delivered to the possession of the appellant, and that the sum of 2,000 rupees deposited in the Provincial Court, together with 42,000 rupees deposited in the Court of Sudder Dewanny Adawlut, should be delivered to the respondent, who was further directed to pay all costs of suit.

NUBKISHORE BUNHOOJEA, Appellant,

1814.

versus

HYDER BUKSH, Respondent.

Aug. 30th.

THIS was a suit instituted by the appellant, Nubkishore, against the respondent Hyder Buksh, in the Provincial Court of Calcutta, on the 25th of July 1812, to recover possession of Purbanput and other villages, which were alleged to have been fairly purchased by the plaintiff from the defendant. The annual produce was estimated at rupees 2,873, and there was also claimed the sum of rupees 3,894, being the amount of profits alleged to have been appropriated by the defendant during a period of three years, exclusive of illegal possession. The suit was admitted by the Officiating Judge, and the defendant was summoned. After pleadings had been filed, at a sitting of the Provincial Court before another Judge, the parties were ordered to deliver their vouchers and lists of witnesses. After some further proceedings had been held, it appeared to the Officiating Judge that the cause was not properly cognizable by the Provincial Court in the first instance, for that, although it had been formerly held, and was obviously proper, that, in a suit for the recovery of lands and profits appropriated during the period of dispossession, the annual produce and the amount of illegal appropriations should be stated at the same time, yet that in the provisions of sections 2 and 3, regulation 13, 1808, it is plainly declared, that, to make a suit cognizable in the first instance by the Provincial Court, the cause of action must exceed 5,000 rupees; viz. if for land, that the annual produce be above 5,000 rupees, and if for any other description of property, movable or immovable, that it exceed in amount and value the said sum of 5,000 rupees; that this case ought therefore to have been instituted originally in the Zillah Court; the annual produce of the lands claimed being only rupees 2,873, and the illegal appropriations, amounting only to rupees 3,894. The plaintiff was accordingly nonsuited, and directed to sue in the Zillah Court. On appeal from the above order to the Sudder Dewanny Adawlut, that Court (present J. H. Harington and J. Fombelle), reversed it for the following reasons: 1st, a suit having been admitted by one Judge of a Provincial Court, it is not competent to any other single Judge of the same Court to dismiss such suit on the ground of its inadmissibility without going into the merits. 2ndly, after having received the plaint, levied the fees due thereon in the Provincial Court, summoned the defendant, and heard the pleadings on both sides, together with the testimony of witnesses and other evidence, it was not (consistently with the spirit of the regulations) competent to the Judge to nonsuit the plaintiff for the reason stated in his decree, and to direct that the suit should be instituted *de novo* in the Zillah Court. 3dly, there are no provisions in the second and third sections of regulation 13, 1808, which declare, that in the event of a person's claiming lands and the profits of those lands unduly appropriated, he shall not be allowed to add together the amount of the annual produce, and the amount of undue appropriations, so as to form

1813. them into one cause of action. On the contrary, it is evidently conformable to the spirit of the regulation, that when a person brings a suit for land or other immovable property, and also for money or other movable property, the aggregate amount of both descriptions of property is to be considered as forming the cause of action. In this case, therefore, the aggregate amount of the property claimed amounting to 6,767 rupees, it appeared to the Court of Sudder Dewanny Adawlut, that the suit fell strictly within the original jurisdiction of the Provincial Court as provided by regulation 13, 1808. That Court were accordingly ordered to readmit the suit and to decide it on its merits. (a)

1814. JUGGUT CHUNDER SEIN, and SARDA PERSHAUD
SEIN, Appellants,
Sept. 12th. *versus*
KISHWANUND and Others, Respondents.

A mortgage declared valid by the former judgment of a Zillah Court, from which no appeal was preferred, found to be illegal on the trial of a subsequent suit for redemption of the mortgaged property; but not set aside on this account by the Sudder Dewanny Adawlut; the former judgment being still in force and voidable only on review, or appeal. Three respondents, each claiming a right of success-

ON the 2nd of December 1800, Beer Bhudranund, since deceased, brought an action *in forma pauperis*, against Devee Pershaud Sein and Juggut Chuander Sein, in the Zillah Court of Hooghly, to recover possession of certain endowed lands appropriated to the support of the Idol Sree Bindrabun Chunder Thakoor, situated in Kishen Batee, the annual produce of which was stated at 10,776 rupees, 12 anas, 17 gundas, 3 cowries; also to recover the sum of 29,034 rupees, 10 anas, 8 gundas, 2 cowries, alleged to be due by the defendants. It was set forth in the plaint, that a person named Sut Deo Suruswutee established an Idol of Sree Bindrabun Chunder, in Kishen Batee, and provided lands to defray the expences of worship and other necessary charges; that on his death he was succeeded in the superintendence of the endowment by his disciple Heela Suruswutee, who, also, on his demise was succeeded by his disciple, and so on in regular succession until the superintendence devolved on Shamanund, and after him on Mudhoo Soodun the plaintiff's spiritual teacher since deceased, as representative of whom he now brought forward his claim; that in the year 1189, B. S., a dispute having

(a) Subsequently, however, in reply to a reference from the Commissioner of Cuttack, the Court determined, on the 29th of September 1820, that, in suits for *malgoozaree* estates distinctly assessed with the Government revenue, or for specific portions of such estates, the rule of estimating the value and determining the form in which the suits are triable, should be the *sudder jumma* alone (as laid down in regulation 1, 1814) distinct from *mesne profits*; and that the Court which adjudges the proprietary right to the estate, may at the same time add an order for the *mesne profits* to be accounted for (where there exists no doubt of their being due) without regard being had to their amount, and without its being considered that the amount, either of the *mesne profits*, or of these added to the valuation of the estate, affects the Court's jurisdiction. In the event, however, of doubt existing as to the right to *mesne profits* or alleged collections, however denominated, it would be necessary that a separate suit should be brought for them in the Court of which the jurisdiction would belong according to the amount demanded. *Mutatis mutandis*, a similar rule would hold in suits for *lakhiraj* land.

arisen between the said Shamanund and Ramchunder Sein (father of the defendants), the latter brought an action of debt against the former, claiming the sum of 106,054 rupees, which sum was awarded in full, and Shamanund being unable to pay it, was sent to jail. That in 1194 B. S., Shamanund executed a bond in favour of the father of the defendants, in which he acknowledged a debt of 85,001 rupees, and empowered that person (after providing for the necessary expences of the establishment) to realize his due from the profits of the endowed lands, and to remain invested with the superintendence of the property, until that object should be effected; that the defendant's father, in virtue of the aforesaid bond and the judgment in his favour, took possession accordingly, and on his demise the defendants succeeded him, and that between the Bengal years 1194 and 1206 (a period of thirteen years) the debt had been more than realized; the profits of the endowed lands during that interval having amounted to 88,737 rupees, 13 anas, 10 gundas, 3 cowries, and the defendants having embezzled effects appertaining to the idol to the value of 14,501 rupees, thus making the sum received by them to amount to 103,238 rupees, 13 anas, 10 gundas, 3 cowries, and the debt being only 85,001 rupees, leaving a balance in favour of the plaintiff of 18,237 rupees, 13 anas, 10 gundas, 3 cowries, which, together with 10,796 rupees, 12 anas, 17 gundas, 3 cowries, profits arising from certain assessed talooks belonging to the property, formed the total amount of the claim. The defendants in answer, pleaded, first, that the plaintiff had no legal interest in the property in question; that his Gooroo never had been a disciple of Shamanund, and consequently never had himself the right of succession to the superintendence; from which it followed, necessarily, that the plaintiff who claimed under him could not have any right of succession. They further averred, that the real disciples of Shamanund and those whom he had constituted his successors, were two persons named Mudwanund and Shewanund, the former of whom had exercised the superintendence during the whole period of Shamanund's confinement at the instance of the defendant's father; that in 1196 B. S., the Gooroo of the plaintiff having forcibly assumed the superintendence of part of the endowed lands he was ejected at the suit of the defendant's father, the Judge of Zillah Burdwan, considering the mortgage of the endowed lands to be a valid transaction, and that the possession should remain with the creditor until the debt was liquidated; that a claim to the right of superintendence having been preferred about the same time by Shewanund, the property was attached by Government, and placed under the charge of an *aumeen* until the year 1201, B. S., when a decree was passed adjudging possession of all the landed property, and appropriation of the profits to the defendants, in liquidation of the debt which appeared from the bond of Shamanund to be due to them. That, in point of fact, they (the defendants) had realized the sum of 5,000 rupees only towards the liquidation of their claim. With respect to the embezzlement of jewels, the defendants alleged that the idol had remained *in statu quo* from the period of their superintendence. From the evidence, however, of numerous witnesses it appeared that the plaintiff's Gooroo had been a dis-

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sion to the mortgaged property, permitted to defend the appeal and referred to a regular suit for the adjustment of their respective claims.

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ciple of Shamanund, and was formally appointed by that person as his successor in the year 1171, B. S., and was on a pilgrimage at the time of Shamanund's demise in 1196, when on hearing of that event, he immediately returned and asserted his right as disciple and constituted successor of Shamanund to take upon himself the management of the endowed lands. The Zillah Judge therefore being of opinion that the plaintiff's Gooroo (Mudhoo Soodun) had clearly a right of succession to Shamanund, and that (the Hindoo law in these cases ordaining the succession of a disciple to his Gooroo in the event of no special disposition having been made,) the plaintiff was the proper representative of Mudhoo Soodun, overruled the objection of the defendants to the plaintiff's action on the plea of his not having any legal interest. In consequence of the opposite statements given in by the plaintiff and defendants respecting the profits received by the latter towards the liquidation of their debt, it became necessary to depute an *aumeen* for the purpose of ascertaining the actual produce of the lands appropriated to the support of the endowment, and the amount of expences incident to the worship of the idol and other charges which must necessarily be defrayed from that fund. After an inspection of the report furnished by the *aumeen*, which contained an account of receipts and disbursements, it appeared to the Zillah Judge, that after allowing for the rent collected while part of the lands were under attachment, and deducting the sums expended by the defendants for the support of the endowment, the sum of 48,653 rupees, 13 anas, 4 gundas, had been appropriated by them in satisfaction of their dues. According to this calculation, as there remained to be paid of the bonded debt the sum of 36,347 rupees, 2 anas, 16 gundas, the Zillah Judge passed a decree dismissing the claim of the plaintiff, and directing that the superintendence of the endowment should rest with the defendants until the liquidation of the whole amount of their debt. The claim to recover the value of the jewels was declared to be inadmissible; they forming part of the property of the idol, all of which by the terms of the obligation was to remain with the defendants until the full amount of the debt should be realized. The defendants being dissatisfied with the adjustment made by the Zillah Judge, as crediting the plaintiff with a larger sum than had been received by them in liquidation of their debt, and as omitting to award interest on that debt, appealed against his decision to the Provincial Court. One of the defendants, Devee Pershaud Sein, dying about this time, was succeeded in the appeal by his son Sarda Pershaud Sein. From the accounts produced in the Zillah Court, the adjustment appealed against appeared to the Judges of the Provincial Court to be proper, and the claim to interest was disallowed for two reasons; first, because interest was not specified in the bond, and secondly, from its not being usual to award interest on such occasions. The Zillah decree was therefore affirmed and the appeal dismissed. Provision was at the same time made for crediting the respondent with whatever sums the appellants might have appropriated in the interval between the two decrees. Juggut Chunder Sein and Sarda Pershaud Sein being dissatisfied with the decision of the

Provincial Court, presented an appeal to the Sudder Dewanny Adawlut. After the pleading on both sides (which consisted chiefly of objections to the accounts produced in the Courts below), and the answers to those objections had been gone through, the respondent Beer Bhudranund died, and three persons, viz: Kishwanund, Birjanund and Sudanund came forward, claiming the succession to the superintendence, as disciples of the deceased. They were all permitted to defend the appeal, as in the event of the endowed lands being taken out of the possession and management of the appellants, the care of them would devolve in conformity with the provisions of regulation 19, 1810, *pro tempore*, on the Board of Revenue. They were, however, referred to a regular original suit for the purpose of establishing their individual right of succession. The bond executed by Shamanund was delivered to the pundits, who were required to furnish answers to the two following questions: 1st, Whether a bond containing a stipulation that the necessary expences of an endowment shall be defrayed from the produce of the lands appropriated to its support, but mortgaging the surplus profits of such lands in satisfaction of a debt specified in the bond, is legal and valid or not, under the provisions of the Hindoo law? 2d, If valid, were Ramchunder Sein (the obligee), and his heirs thereby empowered, after the death of Shamanund, to appoint at their discretion any one of his disciples, or any other person to be his successor in the superintendence of the endowment? The answers of the pundits, to the above interrogatories, were as follow: "That which is produced from lands endowed for a religious purpose is sacred property. Shamanund was not entitled to make a gift, sale or mortgage of such property; and the bond executed by him, including a condition for the continuance of the necessary disbursements was not a legal or valid instrument; because the obligation to assign the lands was made without ownership." 2d, Had the bond executed by Shamanund been legal and valid, Ramchunder Sein and his heirs would, in virtue of that instrument, have been authorized to select a qualified person from among the disciples of Shamanund, and to appoint him superintendent of the endowed lands. In a suit brought by the elder widow of Raja Chutter Sein against the younger widow (*vide* page 180, vol. I.) it was determined by the Court of Sudder Dewanny Adawlut, after taking the opinion of the pundits, that lands duly endowed for religious purposes are not subject to private alienation. But the alienation in this case having been held valid in the suit between Ramchunder Sein, plaintiff, *versus* Muddoosoodun, decided by the Judge of Zillah Burdwan in 1793, and that decree, which was not appealed from, being still in force, the Court of Sudder Dewanny Adawlut were of opinion (present J. H. Harington and J. Fombelle), that the invalidity of the mortgage was not a sufficient reason for taking the possession of the mortgaged lands from the appellants; as where a title has been determined by the judgment of a competent tribunal, it cannot be reversed except on review or on appeal. The present suit, however, not having been brought to set aside the decree of the Burdwan Court, but to recover possession of the mortgaged

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lands on an alleged fulfilment of that decree by the liquidation of the debt, the Court, after an inspection of the accounts produced on both sides, were of opinion, that the adjustment made by the Provincial Court was fair and equitable; and there being no stipulation of interest in the bond, that the appellants were not entitled to receive any. Judgment was therefore given for the lands being put into the possession of respondents, as soon as the whole amount of the debt should be liquidated from the produce; and it appearing from the accounts of the *aumeen*, that the profits realized from the lands in the interim between the decrees of the Zillah and Provincial Courts, had amounted to 14,087 rupees, 10 anas, 4 gundas, 3 cowries, which being deducted from 36,347 rupees, 2 anas, 16 gundas, (the sum awarded as due in the decree of the Provincial Court), would leave a balance of 22,259 rupees, 8 anas, 11 gundas, 1 cowrie; this latter sum was declared to be recoverable from the lands before they could be taken out of the possession of the appellants. From a proceeding subsequently transmitted by the Provincial Court, it appearing that the appellants had been suspected of falsifying their accounts, that part of the Sudder decree which related to the adjustment of the balance was revoked, and the question was referred for further investigation to the Provincial Court, which Court transmitted a proceeding dated the 5th of March 1817, to the Sudder Dewanny Adawlut, informing them, that from the further investigation which had been made, no proof existed of the appellants having falsified the accounts; previously to this, however, the appellants relinquished possession of the lands, in consideration of receiving 1,100 rupees in addition to the mesne profits from the date of the Zillah decree up to the end of 1816.

1814.

Sept. 7th.

GOOLAB NARAIN, Son of BHURT NARAIN, Appellant,
versus
PRETUM SINGH, Son of JOOGUL SINGH, Respondent.

Mocurreree
leases
granted by
the col-
lector of
zillah Be-
har in
1788, and
sanctioned
by the
Govern-
ment and
Court of
Directors,
not held
to be an-
nulled by
the subse-
quent pro-
mulgation

THIS was a suit instituted by Joogul Singh against Bhurt Narain in the Zillah Court of Behar on the 2d of *Aghun*, 1205, F. S., or 6th of November 1797. The plaintiff, who was proprietor of a seven ana share of mouza Maroocha Khord, pergunnah Pelich, claimed a share in the *mocurreree* settlement made in the year 1788, A. D., or 1196, F. S., stating, that the defendant, Bhurt Narain, who was proprietor of a three ana share only of that estate, had represented himself as proprietor of the whole, and had thereby procured the settlement to be made with himself; that he (the plaintiff) did not come forward at the period of the formation of the *mocurreree* settlement, as he was not in actual possession of his own lands, having mortgaged and made livery of them some time before to a person named Fyzoollah Khan; that he had since redeemed them, and prayed therefore to be put in possession of his share, and to have his name registered as *mocurrereedar* of a seven ana share of the estate, the proportion of assessment on which

would amount to rupees 13,111. The defendant, in answer, denied the plaintiff's right to any share in the *mocurreree* settlement, and alleged, that in the year 1196, F. S. or 1788, A. D. Mr. Law, the Collector, advertised for proposals to be sent in by proprietors and others for the purpose of forming a settlement; that the plaintiff and his mortgagee were both present at the time, and yet neither came forward; that the *mocurreree* tenure was granted to the defendant and his heirs, and afterwards confirmed by Government, with a stipulation of allowance, as *malikana*, to the excluded proprietor, for which purpose a certain portion of land had been appropriated to the plaintiff, who had enjoyed and still continued to enjoy it. The plaintiff, in replication, pleaded, that he could not have come forward at the period of the formation of the settlement with the defendant; that this was incumbent on the mortgagee, from whose neglect it was not just to make him suffer, and that in section 28, regulation 8, 1793, it is expressly declared, that in cases of mortgage, if the mortgagee has obtained possession of the lands, the settlement is to be made with him, and the proprietor is to be declared to succeed to his engagements on recovering possession, either by the discharge of his obligation or by the decision of a Court of justice. The following were among the principal vouchers adduced by the defendant. A *mocurreree pottah* from the Collector, drawn out in *Assin* 1196, F. S. corresponding with September 1788, A. D. in the following terms; "Whereas the mouza of Maroocha Khord in pergunnah Pelich, containing 530 beegahs, 12 biswas, has been granted to Bhurt Narain in fain from the commencement of the year 1196, F. S. at the *jumma* of 301 rupees, exclusive of *sayer* duties; he must therefore pay up the revenue of the aforesaid mouza, settled at the above amount, year by year, without increase or diminution, agreeably to his *caboolcut* and account *histbundy*. If any one establishes his claim to the zemindaree of the aforesaid mouza, he will annually pay to him and his heirs *malikana*, at the rate of ten rupees *per cent*, on the *jumma* aforesaid, over and above the rent of Government. If at any time expenses are incurred by Government for protecting the country and on other accounts, he will agree to the raising of taxes, in proportion to the *mocurreree jumma*, for paying off those expenses. If in the neighbourhood of the said mouza any disputes arise respecting its boundaries and limits, and the extent is lessened by a decree of the *adawlut*, he is not to claim any deduction, but be held responsible for all such charges of lawsuits and litigations as well as losses of season and expenses of cultivation. Government has nothing to do with those circumstances. The above rent is stipulated for the mouza, and is recoverable from him or his heirs or by the sale thereof. Whatever engagements in money or kind are mutually entered into at the beginning of the year, with the satisfaction of the ryots, he will adjust without any *abwabs* or cesses, and will collect according to the terms which are settled without any encrease thereon. He will faithfully account with Government for all unclaimed property of persons dying and flying from the country, and give up all right thereto. He will pay on his own account for raising embankments and cutting water courses at the aforesaid mouza, or jointly with other persons at

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of general
rules for
the decennial settle-
ment of
Bengal,
Behar
and Orissa.

1814. another place, when it is their mutual interest, without excuses. If the Honorable Company in England, or the Governor General in Council approve of perpetuating the *mocurreree* lease to him and his heirs, a *mocurreree sunnud* shall be granted and authenticated with the Company's seal and signed by the Governor General in Council; but in case of their not confirming it, it is hereby declared that the engagement is made for one year only; and after that term is of no validity whatever." A copy of a *purwana* from the Collector to the *Tehseeldar* acquainting him that Government had approved of the *mocurreree* settlement, and directing that officer to encourage the *mocurrereedars* to promote cultivation accordingly, dated 30th of *Aghun* 1196, or 13th of December 1788. Copy of another *purwana* from the Collector to the same officer dated the 15th of *Phalgun* 1196, or 2d of January 1789, observing that many persons styling themselves proprietors had put in their claims to hold their lands as *mocurrereedars*, but that none except those who had received *mocurreree* leases at the time of the settlement could have any claims to such tenures; that those whose names had been registered as *mocurrereedars* should hold the lands exclusively; and that any proprietor, proving himself to be such, should obtain 10 per cent as *malikana* on the *mocurreree jumma*. Copy of a proclamation under signature of the Collector, issued October 25th, 1790, or *Carrick* 3d, 1198, to the following effect: "It appears from the representation of the *Tehseeldar* of pergunnah Pelich that an inundation occurred in 1198 F. S, and that the *mocurrereedars* do not exert themselves to pay the revenue, under an apprehension that their grants will not be continued. It is therefore publicly notified that the engagements with the *mocurrereedars*, as far as they respect pergunnahs Pelich, Noorhut, Samoy, Behar and Maldah, which were entered into in the year 1196 F. S, have been ratified by Government; that the *mocurrereedars* whose names have been registered for those lands shall be in no respect molested, on condition of their paying the revenue punctually, with the balance that has accrued, and that they shall be at liberty to sell, mortgage, or otherwise alienate the same at their pleasure."

The Zillah Judge passed a decree in favour of the plaintiff's claim with costs, on the following grounds: "According to section 4, regulation 8, 1793, the plaintiff was entitled to the settlement, provided he agreed to enter into the requisite engagements; but it is not in proof that the option was ever afforded to him; besides which, at the time of the settlement, the land was not in his possession, but in the possession of a mortgagee. Regulation 8, 1793, which directs that a new settlement for the land revenue shall be concluded for a period of ten years, commencing with the year 1197, does not confirm the settlement of 1196. The plaintiff is proprietor of a 7 ana, and the defendant of a 3 ana share of the lands held by a *mocurreree* lease. No good reason appears therefore for excluding the former from the settlement." Bhurt Narain, being dissatisfied with the above decree, appealed from it to the Provincial Court of Patna. He cited a case (*Gundurp Singh versus Girdharee Singh*) which had been formerly decided by that Court, in which it had been held that a *mocurreree pottah*, granted by

Mr. Law, could not be cancelled. Joogul Singh also cited three cases in which the opposite doctrine had been held, and the settlement made by Mr. Law with persons not being proprietors of the land were cancelled, and new engagements taken from the *maliks* or proprietors. The decree of the Zillah Judge was affirmed by the Provincial Court for the following reasons, assigned in the decree of the latter Court: "The cause cited by the appellant is not applicable to the present case, being relative to an application of section 16, regulation 8, 1793, on the decease of a *mocurrereedar*. The other three causes cited by the respondent are applicable, and it appears that, although the same vouchers were produced to uphold the right of a *mocurrereedar* not being proprietor, as those now brought forward by Bhurt Narain against the claim of Joogul Singh, yet decrees were given in the Zillah Court and affirmed by the Provincial Court in favour of the proprietors. It has therefore been repeatedly decided that *pottahs*, *purwanas*, &c. signed by Mr. Law respecting the settlement of pergunnah Pelich, &c. form no bar to the claim of other *maliks* whose names are not entered in such vouchers. In the present instance, it is proved that Joogul Singh is *malik* of a 7 ana share of mouza Maroocha; and the said share having been held in mortgage at the time of the settlement formed by Mr. Law, is a sufficient cause for Joogul Singh's not having come forward and put in his claim for a share of the *mocurreree* tenure."

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Goolab Narain, son of Bhurt Narain, since deceased, being dissatisfied with the decree of the Provincial Court, presented a petition for the admission of a special appeal to the Sudder Dewanny Adawlut, which was admitted; the Court being of opinion that the final decision of the case would be useful for the determination of claims which might hereafter be preferred respecting other *mocurreree* tenures in Behar. The causes cited by the parties in the Provincial Court were called for. On an inspection of them, it appeared that the case of Gundup Singh *versus* Giridharee Singh, cited by the appellant in the Provincial Court, was in substance as follows; Giridharee Singh laid claim to an 8½ ana share of the village of Kaunta, pergunnah Pelich, the *mocurreree* tenure of which had been granted in the year 1196, F. S., to Phoolail Chund, a stranger, who sold it in 1199 to Gundup Singh, and died in 1203. The claim was grounded on the extinction of the *mocurreree* tenure under section 16, regulation 8, 1793, which provides for the settlement being made with the actual proprietors of the soil on the demise of the *mocurrereedar*. Judgment was given for the claimant in the Zillah Court, but this decision was reversed on appeal by the Provincial Court for the following reasons: 1st, the Orders of Council declare the *mocurreree* tenures granted by Mr. Law transferable and hereditary. 2dly, if the tenure were cancelled under section 16, regulation 8, 1793, it would still remain discretionary with the Board of Revenue and Government to make the settlement or not with the claimant. 3dly, under the provisions of regulation 6, 1807, the village is not divisible, as too minute a subdivision would ensue, which is prohibited. It appeared also from an inspection of the three cases cited by Joogul Singh, the respondent in the Provincial Court, that

1814. they were decided in favour of the claim of the proprietors to hold the *mocurreree* tenure, not on the ground of their being proprietors, but on the ground of their having made offers to enter into engagements at the time of the *mocurreree* settlement by Mr. Law, which offers were fraudulently suppressed, and the settlement made with the defendants, who appeared in those instances as ostensible *maliks* of the whole estate. From these circumstances, it was evident that the precedent quoted by Bhurt Narain was strictly in point and favourable to his cause. Whereas, in the cases in which judgment had been given for the proprietors, the decisions had turned on a matter of evidence, without at all touching the abstract question of right. The Third Judge of the Sudder Dewanny Adawlut (J. Stuart) before whom the cause originally came, delivered his opinion to the following effect: "In the year 1196, F. S., or 1788, A. D., Mr. F. Law, Collector of Behar, made a *mocurreree* settlement of mouza Maroocha Khord, pergunna Pelich, with Bhurt Narain, who was a sharer in the said mouza, and granted a *pottah* containing the following conditions; 1st, that Bhurt Narain and his heirs should pay a quit rent to Government of 301 rupees; 2d, that if any person should subsequently prove his proprietary right, Bhurt Narain should pay to such person or his heirs 10 per cent on the *jumma* as *malikana*; 3d, that, in the event of his *mocurreree* settlement being approved of by Government and the Court of Directors, he should receive a *sunnud* confirming the tenure to him and his heirs for ever, and that in the event of their disapproval, it should enure to him for one year only.

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On the 17th of January 1788, or 4th *Poos* 1195, B. S., Mr. Law transmitted to the Board of Revenue a plan which he had prepared for the *mocurreree* settlement of all the estates in Behar. On the 4th of October 1788, or 27th *Kartick* 1196, F. S., he transmitted another plan for the particular settlement of five pergunnahs situated in Behar, namely, Pelich, Noorhut, Samoy, Behar and Malka. Both these plans were submitted to Government, and on the 3d of December 1788, or 20th *Aghun* 1196, a reply was received from the Supreme Council, approving of the plan for the settlement of the five pergunnahs, and of the conditional *pottahs* granted by Mr. Law for a *mocurreree* lease to be held from year to year until an order for its confirmation or reversal should be received from the authorities in England. No order was at that time passed with respect to the proposed settlement of the whole of Behar. But on the 18th of September 1789, and on subsequent dates, regulations were promulgated for the decennial settlement of the public revenues of Bengal, Behar and Orissa, and it was notified to the proprietors of land, with or on behalf of whom a settlement might be concluded, that the *jumma* assessed upon their lands under those regulations would be continued after the expiration of the ten years, and remain unalterable for ever; provided such continuance should meet with the approbation of the Honorable Court of Directors for the affairs of the East India Company, and not otherwise. On the 12th of October 1789, the Board of Revenue made a reference to Government requesting to be informed whether or not the enactment for the decennial settle-

ment of Behar generally, was intended to annul the particular settlement for the five pergunnahs which had been previously authorized. The Board were informed in reply, that the particular settlement, which had been formerly concluded by authority, was not intended to be annulled by the enactment of the new rules for a general decennial settlement, but that the provisions contained in those rules should be considered applicable to the first settlement, and if on the receipt of orders from the authorities at home, it should appear that that settlement did not meet with their sanction, the *mocurrereedars* should still be allowed to hold their lands at the *jumma* specified in their engagements for a period of ten years commencing with the year 1197, F. S. In the public letter from the Court of Directors, dated the 19th of September 1792, they notice the settlement made by Mr. Law for the five pergunnahs, and observe that it should be consolidated with the general settlement and be subject to the same condition (namely their approbation) with respect to its continuance or annulment. In that letter the Court do not pass any specific orders regarding the rights of different descriptions of landholders, probably as being a question not coming within the immediate scope of their consideration; but it is evident from the Orders of Council passed on the 6th of March 1793, that they were understood to intend that the *mocurrereedars*, their heirs and lawful successors, should be allowed to hold their estates for ever, on the terms of the original assessment. In the orders above alluded to, it was declared that the settlement made by Mr. Law for the five pergunnahs should not be liable to any alteration; and that the regulation for abolishing the *sayer* duties, the regulations concerning the right of *jotdars*, and the other regulations relative to the general decennial settlement, and the respective rights of zemindars and ryots, should take effect in the said pergunnahs: and notice was given to all the *mocurrereedars*, whose tenures were therein situated, that their estates should be considered as confirmed to them and their heirs for ever, so long as they continued to fulfil the stipulated engagements. From another letter of the Court of Directors, dated the 2d of April 1794, it appears that those orders were approved of; and as no counter order was received, it is evident that the opinions of those in authority here and in England coincided in this instance. The continuance of the particular and of the general settlement depended on one and the same condition, namely, the approbation of the Court of Directors. But both were approved of by the Directors. The one therefore is of equal validity with the other. The confirmation of the general decennial settlement has been proclaimed by a formal enactment; that of the particular settlement for the five pergunnahs has not, and, however the omission of this formality may be regretted, as tending to produce litigation, yet the validity of the settlement is not thereby affected; for the 41st regulation of 1793. (which provides that all regulations which may be passed by Government affecting in any respect the rights, persons or property of their subjects, shall be formed into a regular code), has a prospective and not a retrospective effect, and it would be absurd to question the authority of any orders passed previously to that enactment,

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1814. merely from the circumstance of their not having been incorporated with a regulation. As the general decennial settlement derives its continuance from the sanction of superior authority, and not from the promulgation of that sanction; so the particular settlement derives its continuance from the same sanction and nothing more is essential to its stability. From the above observations it results that the rights of *mocurreedars*, not being proprietors of the soil, or proprietors of only a share, who may have obtained *pottahs* from Mr. Law, are indefeasible; that their leases shall enure to them and their heirs for ever, and that the other proprietors, partners, and their heirs who may not have obtained *pottahs* from Mr. Law, shall be for ever excluded, and shall receive only such allowance as *malikana*, as may be stipulated for them in the *pottahs* of the *mocurreedars*. The claim therefore of Joogul Singh and his son Pretum Singh, the respondent, is inadmissible, and the decrees of the Zillah and Provincial Courts should be reversed." The Chief Judge (J. H. Harrington), concurring in opinion with the Third Judge, as to the appellant's right, under the *pottah* granted by the Collector, and confirmed by the Government and Court of Directors, a decree was passed in his favour accordingly, reversing the decisions of the Zillah and Provincial Courts. The respondent was directed to refund any profits, over and above his right of *malikana*, that might have accrued during the period of his possession under the judgments of the Zillah and Provincial Courts; but as the question had never before been determined by this Court, and as the other Courts had given judgment against the claim of the appellant, it was considered equitable that each party should pay his own costs in the three Courts. (a)

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GOUREEPERSHAUD RAI, Appellant,

versus

Dec. 12th.

MUSSUMMAUT JYMALA, Respondent.

A childless Hinduo having two wives, gives permission to each of them to adopt a son. After having himself adopted a son on behalf of his senior wife, he confirms the permission originally granted to his second

THIS was an action brought by Mussumaut Jymala, on the part of her son Sheopershaud a minor, in the Zillah Court of Dacca Jelalpoor, on the 30th of August 1804, to recover possession of a 4 ana share of Pergunnah Casimpoor, the annual produce of which was estimated at 2,000 rupees. It was set forth in the plaint that an 8 ana share of the aforesaid pergunnah was the hereditary property of the plaintiff's husband, who had another and a senior wife named Parbuttee; that he being childless, had in the year 1199, B. S., given permission to each of his wives to adopt a son, and in furtherance of that permission, had himself adopted a boy named Goureepershaud, on account of his senior wife Parbuttee; that the plaintiff's husband died in the year 1204, and that in the year 1208, the plaintiff, in consequence of the permission obtained from him, adopted on her own account Sheopershaud,

(a) A more particular statement of the *mocurrence* settlement formed by Mr. Law, in nine pergunnahs of Zillah Behar, is contained in a note to the third volume of Mr. Harrington's *Analysis*, pages 239 to 244.

who was therefore entitled to half the estate of her late husband, for the recovery of which, on his behalf, she brought the present action. It was urged in answer by the defendant, that the husband of the plaintiff had not given permission to adopt as alleged by her, and that under any circumstances, the second adoption was illegal. The Zillah Judge, without going into the evidence regarding the fact, thought fit in the first instance to ascertain the law of adoption as far as it affected the case in question. With this view he put the following interrogatory to his Hindoo law officer: "supposing the adoption of Sheopershaud to have taken place as stated by the plaintiff; that is, subsequently to the adoption of Gourcepershaud, and to the death of her husband, though agreeably to his permission; is such subsequent adoption valid, and does it entitle the person so adopted, to share in the estate or not?" The answer to the above reference was in the following terms: "If a childless person adopt a son for the sake of his obsequies, the adopted son becomes like a son of the body; he may also, if unable to adopt a son himself, authorize his wife to do so, and if (with a view to having more than one son at the same time) he authorize his two wives each to adopt a son it is legal. But in this instance it is stated that the husband himself adopted a son on account of his first wife. There being however no authority for his adoption on account of a particular wife, the son adopted by him renders service to all his wives; and hence any previous permission given by the husband is annulled by his own subsequent act. During the lifetime of a son so adopted the wife cannot adopt another. But the son adopted by the father should make a suitable provision for his widow." On consideration of the above opinion of the law officer the Zillah Judge dismissed the suit with costs against the plaintiff. On appeal by Jymala to the Provincial Court of Dacca, that Court required the appellant, in the first instance, to adduce evidence to the fact of her having received authority from her husband to adopt a son, and of her having in conformity with such authority made the adoption in the manner and form required by law. These points were clearly established by the testimony of several credible witnesses; some of whom deposed that they had witnessed the adoption of Sheopershaud by the appellant, which took place as alleged by her in the year 1208, and was performed with all the requisite legal ceremonies. Others deposed that they were present when the appellant remonstrated with her husband on his having given a son exclusively to her rival wife, and begged permission to adopt one immediately on her own account, which request was granted by the husband; who, however, expressed his expectation that she would herself produce offspring, and requested her to wait the result of a few years. The Provincial Court relying on the evidence adduced as to the permission having been granted, and the adoption having taken place in due form, put the following case to their pundit: "A Hindoo had two wives and gave verbal authority to each of them to adopt a son; afterwards he manifested his intention in favour of his first wife by adopting a son for her. After the death of the Hindoo, his second wife, under his authority, adopted a son. By the law current in this country, to whom

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does the estate (movable and immovable) of the deceased person descend, and in what shares?" From the reply received, it appearing that the two adopted sons were entitled to inherit the estate in equal proportions, the Court reversed the decree of the Zillah Judge, and decreed a moiety of the estate to the appellant to hold in trust for her minor son. A petition for a special appeal to the Sudder Dewanny Adawlut (founded on the discrepancy of opinions given in the lower Courts) having been presented by Goureepershaud, the appeal was admitted, and the proceedings, together with the law opinions of the pundits of the Zillah and Provincial Courts, were referred to the Hindoo law officers of the Sudder Dewanny Adawlut, who delivered their sentiments on the case as follows: "If a man having two wives give authority to each to adopt a son, and afterwards in concurrence with his senior wife adopt a son, and after his death the second wife in pursuance of the authority originally obtained from him adopt a son, the adoption by the second wife is not legally valid; because, if a person giving permission, afterwards himself does the thing permitted, the permission given to another becomes by his act void. All the property of the deceased devolves on the son adopted by him." But it appeared from the evidence of the respondent's witnesses in the Provincial Court, that the permission granted originally by the husband, was confirmed to the second wife after he had made an adoption in favour of his senior wife, and that the permission was partly conditional, from his request (founded on the expectation of his second wife's producing offspring) that it should not be acted upon immediately. The pundits were therefore required to state whether these circumstances would alter the nature of the case; to which they replied, that, under these circumstances, the desire of the adoptive father being obviously to have many sons (which was a laudable desire) his estate real and personal should be shared by each of the adopted sons in equal proportions. On consideration of the above opinion establishing the legality of two successive adoptions by two wives under authority from their husband (which corresponds with the decision in the case of Shamchunder and Roodechunder *versus* Naravni Dibeh and Ramkishor, *vide* vol. 1, page 85) the decree of the Provincial Court in favour of the respondent appeared just and proper. It was accordingly affirmed by the Sudder Dewanny Adawlut (present J. H. Harington) with costs against the appellant, who was directed to account to the respondent for half the profits of the estate which had accrued during the period of his sole possession.

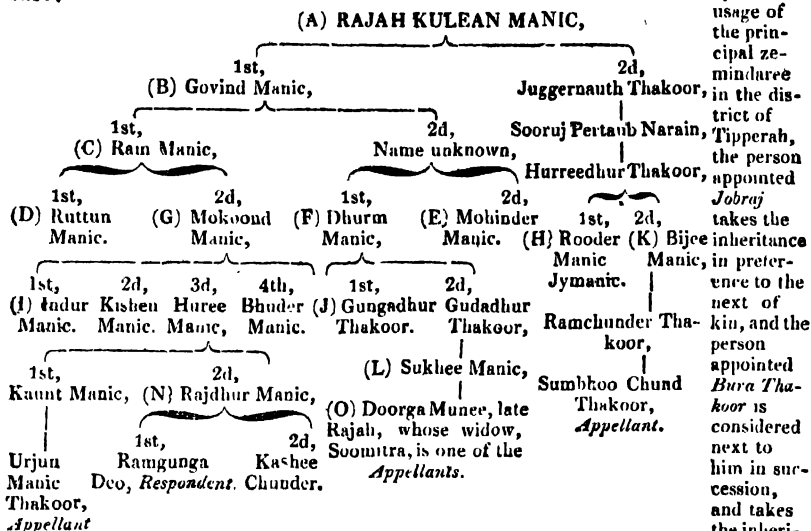
URJUN MANIC THAKOOR, SUMBHOO CHUNDER THAKOOR and RANEE SOOMITRA, Appellants, 1815.

versus

March 24th.

RAMGUNGA DEO, Respondent.

THE following genealogical table may tend to illustrate this case:



ON the 18th of April 1813, the Judge of Zillah Tipperah, having obtained information of the demise of Doorga Munee, a very considerable zemindar in that district, who was childless and intestate, issued orders for the appointment of an administrator to take temporary charge and management of his property, and reported the circumstance to Government. A summary enquiry was directed to be instituted, with the view of ascertaining in whom the right of succession vested, and on the 6th of May of the same year, all persons claiming as heirs were invited by proclamation to come forward and substantiate their claims. On the receipt of this public notice, Ramgunga Deo, the respondent, immediately came forward and presented a petition, setting forth his right to succeed to the zemindaree, as having been constituted *Bura Thakoor* by his father Rajdhur Manic, at the time that Doorga Munee (the late Rajah), was constituted *Jobraj* by the same person. He alleged that it had been the immemorial usage for the *Jobraj* to succeed, and, in default of him, the inheritance invariably vested in the person constituted *Bura Thakoor*; that this usage had been recognized and confirmed by the Sudder Dewanny Adawlut in the case of Ramgunga Deo versus Doorga Munee, *Jobraj*, (vide vol. 1, page 270), decided on the 24th of March 1809. The genealogical table filed in the above cause was adduced by this claimant, shewing, in an alphabetical series, the successive proprietors of the estate, who (with the exception of one or two cases of forcible possession), had each succeeded by

1815. virtue of the usage above mentioned. At the same time a counter petition was put in by Ramchunder Thakoor, (father of Sumboo (hund one of the appellants), in which he claimed the succession, as being the eldest surviving lineal descendant of the original zemindar Kulean Singh. The other two appellants, Ranees Soomitra and Urjun Manic Thakoor, also preferred their claims to the Zillah Judge. The former rested her pretensions on her being the widow and legal heir of the late Rajah Doorga Munce. The latter preferred his claim in right of his father, and gave in a petition to the following effect: "When Kishen Manic was Rajah he appointed his younger brother Huree Manic, my grandfather, to the office of *Jobraj*. But Huree Manic dying before Kishen Manic, it followed that Kaunt Manic, my father, was the rightful successor. At the period of Kishen Manic's death my father was not on the spot, and his widow Janika Debeh, taking advantage of my father's absence, contrived to get my uncle Rajdhur Manic nominated to the *raj*, and Doorga Munce appointed his *Jobraj*, or successor; which person, in virtue of that title, obtained judgment in his favour in the Sudder Dewanny Adawlut. According to immemorial usage, the *Jobraj* succeeds the Rajah, and in default of the *Jobraj* the *Bura Thakoor* succeeds. In default of both these, the succession devolves entire on the next of kin, respect being had to primogeniture. On the death of Doorga Munce, those entitled to succeed as next of kin are, Ramgunga Deo, Kashee Chunder (his younger brother), and myself; but Ramgunga having been *Bura Thakoor* in the time of Rajdhur Manic; having on the demise of that person taken the *raj* in violation of usage; and in the cause brought against him by Doorga Munce having denied the existence or validity of the usage by which the *Jobraj* and *Bura Thakoor* succeed, and rested his title on the general law of inheritance; he cannot now be allowed to plead that usage in support of his claim. The other person who has a claim to the *raj* by virtue of propinquity (Kashee Chunder), is excluded from the circumstance of my being his senior, and therefore, being alone entitled to succeed to the *raj* and *zemindarce*, I beg that possession may be conferred accordingly." Several other collateral descendants presented petitions on this occasion, but their claims having been rejected, as being obviously inferior to those above mentioned, and they not having appealed to the superior Court against the decision of the Zillah Judge, it is unnecessary to mention the particular grounds on which those claims were preferred or dismissed. With a view of ascertaining the justice of Ramchunder's claim, he was questioned in the Zillah Court as to why he had not preferred it pending the investigation of the former suit relative to this estate. In reply he alleged, that he had done so; and that he had been referred by the Sudder Dewanny Adawlut to an original suit for the establishment of his claim, on which however he did not subsequently insist; Doorga Munce having promised to constitute his son *Jobraj*, which promise had he lived longer he would undoubtedly have fulfilled. Ram Gunga being questioned as to the title by which Rajdhur Manic succeeded to the *raj*, replied, that that person was nephew of the Rajah-Kishen Manic, at whose death, there being no *Jobraj*

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or *Bura Thakoor*, Rajdhur was appointed to succeed; his elder brother Kaunt Manic, though alive, being absent. His appointment took place in consequence of a petition to that effect having been presented to Government by Ranee Janika, widow of Rajah Kishen Manic. The following exhibits were adduced by Ram Gunga in support of his claim: 1st, a report from the Collector of Tipperah to the Council, dated July 15th, 1783, mentioning the death of Rajah Kishen Manic, and informing them that his nephew Rajdhur claimed the succession as next heir, and that it appeared to have been the wish and intention of the late Rajah to have him for a successor. 2nd, a letter dated February 23d, 1785, from the above officer, in reply to an enquiry made by Government respecting the usage and right of succession to the vacant *raj*, in which letter he stated that Rajdhur was the only just claimant, and that the widow of Kishen Manic had, in compliance with her late husband's wishes, presented a petition praying that the *raj* might be conferred on him. 3d, a *purwana* dated in the same year, to the widow of Kishen Manic, informing her, that, in compliance with her request, Rajdhur had been confirmed by Government in the succession to the *raj* of her late husband. 4th, proceedings of the Zillah Court, 24th of March 1809, in the case of Doorga Muneo *versus* Ramgunga, from which it appeared that the former admitted the *Bura Thakoor* to be entitled to the *raj*, if there were no *Jobraj*, and pointed out Ramgunga Deo as the *Bura Thakoor* duly constituted. 5th, proceedings of the Sudder Dewanny Adawlut in the above cause (*vide* page 270, vol. 1). 6th, a petition dated 25th of May 1813, purporting to have been drawn up and sealed by Ranee Soomitra, setting forth that her husband Doorga Muneo, who had become proprietor of the *raj* by order of Government, had died childless, without having appointed a *Jobraj*; and that Ramgunga Deo, son of Rajdhur Manic, being his next of kin, she wished that his title to succeed to the vacant *raj* and *zemindaree* might be recognized and confirmed by Government. The Zillah Judge, after a reference to the decrees pronounced in the former cause relative to this estate, and to the genealogical table filed by the parties, having ascertained that by immemorial usage the right of succession to the Tipperah *zemindaree* was vested in the person constituted *Jobraj*, and failing him in the *Bura Thakoor*, proceeded to decide on the merits of the respective claims as follows: "From the petition of the widow of the late Rajah it appears to be her wish, that the claimant Ramgunga Deo should be the successor to her husband. On full enquiry it appears that Ramgunga was elevated by his father Rajdhur Manic to the title and degree of *Bura Thakoor*, (the next in rank to that of *Jobraj*,) before the succession devolved on Doorga Muneo. On the death of Rajdhur Manic, had there been no *Jobraj*, Ramgunga Deo would unquestionably have succeeded both by right of birth and appointment. Ramchunder Thakoor, the second claimant, is the son of Bijee Manic, who appears to have acquired the *zemindaree* by force, and since whom it has devolved in a legal course on three successive persons. Exclusively of Sukhee Manic, who, from the proceedings in the former case, appears also to have obtained possession by force, the estate had gone first to Kishen Manic, nominated *Jobraj*

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1815. by two preceding proprietors; secondly to Rajdhur Manic, who appointed Doorga Munee *Jobraj*, and Gunga Deo *Bura Thakoor*; and thirdly to Doorga Munee: none of these persons were nearly related to Ramchunder, and he had never been invested with any title indicative of the right of succession. In the proceedings connected with the former case, no mention is made of Ramchunder, and no reliance can be placed on his plea, that the late Rajah had promised to constitute his son, Sumbhoo Chund, the *Jobraj*. His claim therefore is inadmissible. The claim of Urjun Manic Thakoor is founded on his right of representation, as being son of Kaut Manic, son of Huree Manic, who was appointed *Jobraj* by his brother Kishen Manic, in whose lifetime he died. Rajdhur Manic then succeeded, there being no *Jobraj* alive. But Urjun Manic himself and his father, not having preferred their claims to succession in right of Huree Manic, when the estate was vacated by the death of Kishen Manic, the claim of Urjun Manic cannot now be admitted against the sons of Rajdhur Manic. Under the above circumstances, Ramgunga Deo, eldest son of Rajdhur Manic, appears entitled to succeed to the *raj* and *zemindaree*. Were he not entitled to succeed as next of kin, still as the *Bura Thakoor*, as having been in possession before the judgment was given in favour of Doorga Munee, and as having been elected by his widow, he would have a preferable title to any other claimant. Doorga Munee himself, in answer to a question from this Court, declared Ramgunga to be *Bura Thakoor*, and entitled to succession if there were no *Jobraj*. From the *vyuvastha* of the pundits in the former case, it would appear that the particular family usage supersedes the general law of inheritance, and that the *Jobraj*, or failing him the *Bura Thakoor*, is heir, in preference to any lineal descendants from former *rajahs*, on whom those titles may not have been conferred. Ordered, therefore, that a summary decision be passed in favour of the claim of Ramgunga Deo, and that a precept be issued to the Collector to make over the *raj* and *zemindaree* to that person." The pretensions of the widow were not investigated; her petition in favour of Ramgunga Deo amounting to a renunciation of them.

The claimants who were rejected, being dissatisfied with the above decision, appealed against it to the Provincial Court of Dacca. Ramchunder having died shortly after the admission of the appeal, was succeeded by his son Sumbhoo Chund. The appellant Soomitra denied the authenticity of the document purporting to be a petition from her for the appointment of Ramgunga to the vacant *raj*. The pleas of the other appellants were similar to those adduced by them in the Zillah Court. It seemed to be generally admitted that the *Bura Thakoor* had the right of succession failing the *Jobraj*; but the principal argument made use of by the appellants was, that the respondent, having in violation of that usage, taken the *zemindaree*; and after being ejected by Doorga Munee, not having received a confirmation of his title from that person, could not now lay claim to the succession in virtue of that usage. The Second Judge of the Provincial Court (J Rattray) was of opinion that a further investigation was necessary, with a view to ascertain whether, as pleaded against the

title of Ramgunga, his having taken possession of the *raij* on the death of Rajdhur Manic deprived him of his right as *Bura Thakoor*, such title not having been confirmed to him by Dooiga Munee, in consideration of whose superior title of *Jobraij* he was ejected. The Third Judge (J. M. Rees), recorded his opinion that no further investigation was requisite, and that the decision of the Zillah Judge should be confirmed; Gunga Deo having remained in possession as ostensible heir only, until the right of succession was determined. The Senior Judge (S. Bird), concurring with the Third Judge, the decision passed in the Zillah Court was affirmed accordingly. The appellants being dissatisfied with this decree, presented a petition to the Court of Sudder Dewanny Adawlut for the admission of a summary appeal, which was complied with. The Court, however (present J. H. Harington), being satisfied of the superiority of Ramgunga Deo's claim as *Bura Thakoor*, according to the established usage of the zemindaree, ascertained in this, and in the former case referred to, and of the insufficiency of the pleas adduced against it by the appellants, confirmed the decisions of the Zillah and Provincial Courts, with costs against the appellants.

1815.

Urjun Manic Thakoor, Sumbhoo Thakoor, and Rane Sommitra v. Ramgunga Deo.

RAMDOOLAL MISSER, Appellant,

1815.

versus

MUDDUN MOHUN BIJUTTACHARYA, and others,
Respondents.

April 17th.

MUDDUN MOHUN and the other respondents, five in number, brought an action in the Zillah Court of Hoogly, on the 10th of March 1806, against the Collector of Burdwan, Radha Madhoo Ghose, guardian of Chunder Narain Rai, and Ramdoolal Misser. They claimed the village of Noupura, situate in pergunnah Roonkumpoor, the decennial produce of which was estimated at 5,205 rupees. This village, in the year 1164, B. S. had been granted to the plaintiffs to hold free of assessment under the designation of *birmooter*, by Lukhee Narain Rai a former zemindar. In 1208, B. S. corresponding with 1801, A. D., the zemindaree having devolved on the minor, Chunder Narain Rai, a portion of it, namely, mouza Doolubpoor, was sold in satisfaction of some arrears of public revenue, which had accrued, and the tenure of the plaintiffs was advertised to be sold as a portion of that mouza. The plaintiffs presented a petition to the Board of Revenue remonstrating against this proceeding, and procured an order against its being carried into effect; but in the interim the sale had been made, and their village was included in the lot advertised. It was purchased by Ramdoolal Misser; who, being prevented by the plaintiffs from taking possession of that part of the lot which they held as a free tenure, instituted a summary suit against them under the provisions of regulation 7, 1799; and obtained judgment in his favour. Muddun Mohun and the other plaintiffs were advised at the same time to try the question of right, by instituting a regular suit

A *Birmooter* tenure free of assessment, being erroneously included in the assets of an estate sold by auction, on account of arrears of revenue, is recoverable from the public purchaser, at the suit of the proprietor. No deduction of assessment can be granted on such account by the judicial authorities;

1815. against the zemindar of the estate, along with which their property was sold, and against the purchaser in possession. They accordingly brought this action against Radha Madhoo Ghose as guardian of Chunder Narain Rai, zemindar; against Ramdoolal Misser the purchaser, and against the Collector of the district who made the sale; claiming, besides the recovery of their landed property, to be reimbursed in the expences to which they had been subjected in defending the summary suit instituted against them. The Collector, in answer, pleaded, that no action could properly lie against Government in this case, as the lands sued for had been represented by the officers of the zemindar, to be subject to assessment, and had therefore been included in the lot sold. The defendant, Radha Madhoo Ghose, admitted the fact of the lands in question being free of assessment; and of the plaintiffs having held them as such for a long period. The defendant Ramdoolal Misser pleaded, on the other hand, that the lands had always been subject to the public assessment. It appeared clear, as well from the admission of Radha Madhoo Ghose, as from the other evidence adduced, that the land claimed was free of assessment; and that the plaintiffs had enjoyed it as such antecedently to the year 1765, the period of the Company's accession to the Dewanny; but it also appearing that the officers of the late zemindar had represented it as subject to the payment of revenue; (in consequence of which it was advertised with the rest of the lot and purchased by Ramdoolal Misser), that person, previously to the passing of the final decree, was allowed the option of recovering his purchase money, on condition of waving his right to the lot purchased by him, but he preferred to abide by the result of the suit; expressing his hope that, should the lands in question be pronounced by the decree to be free of assessment, and consequently restored to the plaintiffs, a proportionate deduction might be made from the assessment of his estate. This however he was informed was beyond the competency of the Courts, and that no deduction could be made from the assessment except by the express authority of Government. The Zillah Judge, after examining the documents and witnesses brought forward by both parties, passed a decree in favour of the plaintiffs; directing that they should be immediately reinstated in their free tenure of Noupara, and, in conformity with clause 5, section 29, regulation 7, 1799; that they should recover the sum of 1,102 rupees, from the defendant Radha Madhoo Ghose, guardian of the minor zemindar, being the amount, principal and interest, of produce for two years appropriated by the defendant Ramdoolal Misser; also the sum of 175 rupees, being the amount of costs incurred in the summary suit. At the same time an order was passed that Radha Madhoo Ghose should reimburse Ramdoolal Misser in the sum of 1,204 rupees, 13 anas, 18 gundas, being the amount of revenue paid by him to Government during his possession of the village Noupara, and the sum of 140 rupees, 1 ana, 18 gundas, being the computed amount, principal and interest, of purchase money which (relatively to the sum paid for the whole lot) had been paid by him at auction for that portion. The plea of the Collector being considered sufficient to exonerate him from being charged with the expences

but an option of relinquishing his bargain will be given to the purchaser. The latter availing himself of the option to retain his purchase at the assessment fixed on the estate at the time of the public sale, is not entitled to any retrospective indemnification for the revenue paid by him on account of the *brimooter* tenure erroneously included in his purchase; but a proportion of the purchase money, computed to be the amount paid for the tenure adjudged to the plaintiff in this cause, was ordered to be restored to the purchaser by the original zemindar.

of defending the suit, the defendant, Radha Madhoo Ghose, was charged with the payment of all costs. Ramdoolal Misser being dissatisfied with the above decision, appealed from it to the Provincial Court of Calcutta. He was unable, however, to adduce any further evidence of the lands in question having ever been subject to assessment, and the respondents, in addition to the evidence adduced by them in the Zillah Court, filed a *purwana* granted by the Collector of Moorshedabad, in confirmation of the *sunnud* conferred by Lukhee Narain; the nature of the tenure having come under the investigation of that officer, in consequence of an attempt made by a former zemindar to exact rent from it, which was resisted by the respondents.

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Mohun
Bhutta-
charya, and
others.

The decree of the Zillah Judge was affirmed, with costs, by the Provincial Court, as far as it went in awarding to the respondents possession of the lands claimed, with a refund of the amount of produce appropriated during their dispossession, together with costs of suit in the summary action formerly brought against them. But instead of subjecting the estate of the zemindar Chunder Narain Rai to these charges, as awarded in the Zillah Court, they were made payable, with interest, by the purchaser Ramdoolal Misser. On a further appeal to the Sudder Dewanny Adawlut (present J. H. Harrington and W. E. Rees), the decrees of the Zillah and Provincial Courts, establishing the right of the respondents to recover the tenure claimed by them, were affirmed. But the order of the Provincial Court for the payment by the appellant of 175 rupees, the amount of costs incurred by the respondents in the summary suit, was annulled; the Court observing that the order of the Zillah Court in this instance, charging the estate of the zemindar with the payment of that sum was just and proper; as, in the accounts of the estate, the free tenure of Noupara was stated to be subject to assessment, and being advertised along with the rest of the lot, the appellant considered that it formed a part of his purchase, and he was therefore by no means culpable in bringing a summary action for the recovery of it. The order of the Zillah Court (virtually though not expressly affirmed by the Provincial Court), for the payment, out of the zemindar's estate, to the appellant, of the sums disbursed by the latter on account of the public revenue, was also annulled; the Court observing, that the appellant, having been offered an option of relinquishing his purchase, which he refused, and still preferring to hold the estate at the *jumma* assessed upon it previously to the separation of the village of Noupara, could not complain of any grievance; whereas, the zemindar might justly complain, were he required to refund to the appellant the sums paid on account of the public revenue for the portion of the estate restored to the respondents, as it was obvious from the appellant's refusal to relinquish his bargain, that, independently of the restored portion, he considered the property remaining to him as amply sufficient to satisfy the public demand upon it. The Court, however, confirmed the order adjudging the appellant's right to recover from the zemindar such sum (with interest from the date of the sale), as might, with reference to the price paid for the whole lot, be the computed price paid by him for Noupara, under a supposition that

it was liable to assessment and sale. The costs of suit in the Court of Sudder Dewanny Adawlut were made payable by the appellant.

1815.

MOOHUMMUD JAUN CHOWDHRY, Appellant,

versus

April 29th. RAMRUTTUN DAS, (Guardian of BINDRABUN CHUND RAI, KISHEN LOCHUN RAI, and KALEE DAS RAI, Minors; Heirs of RAMKESHOO RAI), Respondent.

A person having obtained a bill of sale for certain lands on the payment of 4,401 rupees, executes a written engagement, in which he agrees that he shall not be put in possession of the lands for the period of one year, four months and seventeen days; at the expiration of which period the lands shall be resold to the seller, on condition of his paying the sum of rupees 5,801; otherwise the engagement to be considered null and void, and the property to vest absolutely in the purchaser.

THIS was an action instituted by Ramkeshoo Rai, on the 25th of *Sawun* 1211, B. S. corresponding with the 8th of August 1804, in the Zillah Court of Tipperah, to recover possession of a 1 ana, 10 gunda share of a zemindaree, consisting of 7 anas, 18 gundas, 1 cowrie, situated in pergunnah Dhoorlau. The annual produce of the share claimed was estimated at 4,105 rupees, and the *jumma* assessed upon it was stated to be 3,570 rupees. The claim was founded on a sale alleged to have been made, on the 13th of *Magh* 1205, B. S. by Moohummud Danish Chowdhry, the proprietor of the said share, to the plaintiff, for the sum of 4,401 rupees: The bill of sale, the receipt for the purchase money, and the deed of separation, bore the signature of the late proprietor, but there was an engagement entered into at the same time between him and the plaintiff Ramkeshoo, in which it was stipulated, that the latter should re-sell the estate to the former, on condition of his paying the sum of 5,801 rupees, on or before the 30th of *Jeyth* 1207, B. S., on failure of which condition the engagement was to be considered null and void. The original proprietor died in *Bysakh* 1207, B. S., and, after the expiration of the term stipulated in the engagement, the plaintiff applied to the Collector for a partition of the portion sold to him, but this application was rejected on the ground of Moohummud Jaun, the heir of Moohummud Danish, being a minor. The whole zemindaree was shortly afterwards farmed out for the term of seven years to one Jaun Moohummud. The persons against whom the plaintiff brought his suit in the Zillah Court were Ram Das Rai, guardian of Moohummud Jaun Chowdhry, and Jaun Moohummud the farmer.

The defendant, Ram Das Rai, pleaded, on the part of his ward, total ignorance of the transaction on which the claim of the plaintiff was founded; and that Beechoo Beebee, widow of the deceased proprietor, had, on his demise, taken possession of his estate in satisfaction of dower, and still continued to receive a *moshaira*, or stipulated monthly allowance from the farmer: that the suit therefore ought to have been brought against her, and not against his ward. The defendant, Jaun Moohummud, alleged that he had taken the estate in farm, without notice of any incumbrances, and that when the Collector accepted his proposals and confirmed the lease to him, the plaintiff raised no objection. Beechoo Beebee, the widow above mentioned, presented a petition at this stage of the proceedings, praying to be admitted to defend the

suit; and setting forth that her late husband had assigned his landed and other property over to her in payment of her dower, which amounted to 130,000 rupees; that she had taken possession of his zemindaree accordingly; had paid the revenue regularly; had prosecuted all claims, and defended all suits connected with it; and since it had been farmed had received from the farmer the *moshaura* or proprietary dues. This petition was however rejected, and the petitioner referred to a separate suit for the establishment of her claim, as it appeared that when a manager was appointed by the Court of Wards, on the part of her son Moohummud Jaun Chowdhry, and when the lands were let out in farm by the Collector, she had permitted these transactions to pass unnoticed; thereby virtually recognizing the exclusive right of succession in her son. The plaintiff replied by alleging that the plea of ignorance on the part of Moohummud Jaun was unfounded, that the deeds on which the claim was founded were duly registered; and that the sum received by Moohummud Danish had been appropriated by that person to the liquidation of arrears of revenue, on account of which his estate was about to be sold.

The defendant Ram Das Rai rejoined, that the deeds (admitting them to be genuine), were not binding upon the person by whom they were executed or his representatives; the terms of them being usurious.

The following vouchers were produced in the Zillah Court: 1st, the *cubala*, or bill of sale, dated the 13th of *Magh* 1205, B. S., responding with the 24th of January 1799, signed by Moohummud Danish and attested by five witnesses. It purported to convey to the plaintiff, in full proprietary right, the share claimed, in consideration of receiving rupees 4,401; a receipt for which sum was annexed. This deed was duly registered by the Register of the Zillah, on the 8th of February 1799. 2nd, the *kharynama*, or deed of separation, stating the quantity of the estate transferred, and the amount of *jumma* assessed upon it, and authorizing the separation of the portion transferred from the remainder of the estate. This deed bore the same date and was authenticated in the same manner as the bill of sale. 3d, The *ikrarnama* or engagement executed by Ramkeshoo Das to Moohummud Danish, dated of the same day as the bill of sale, and attested by five witnesses. After noticing the sale of the 1 *ana*, 10 *gunda* portion of the estate, the said deed proceeds as follows: "If on or before the 30th day of *Jeyth* 1207, B. S., you shall pay to me the sum of rupees 5,801, as the price of the said portion, I will re-sell it to you. In the mean time I will leave you in possession, and will not take advantage of the deed of separation. But if, after the expiration of the stipulated term, the aforesaid vour for sum be not paid, this engagement shall be considered null and void. I will enter on the portion purchased by me, and cause separation of it to be made from the rest of the estate and register it in my name." Judgment was given against the plaintiff, in the following terms, by the Zillah Judge: "The deed on which the claim of the plaintiff is founded, appears to be in truth a mortgage bond, given for security of repayment of rupees 4,401, lent by the plaintiff. The legal interest of this sum from 13th of *Mugh* 1205,

1815. Such transaction held to be in reality a *bye-bill-wufo*, or mortgage and conditional sale. and the condition for the re-sale being virtually a stipulation for interest beyond the legal rate, the transaction held to be in violation of regulation 15, 1793, and the interest liable to forfeiture. But the bill of sale and engagement having been publicly registered, the transaction not held to be an evasion of the above regulation; involving forfeiture of the principal. The purchaser's claim to the lands rejected: with a judgment in his favour for rupees 4,401, the amount of his original advance.

1815. to 30th of *Jeyth* 1207, a period of one year, four months and seventeen days, at 12 *per cent per annum*, would amount to rupees 729, making the debt to form the sum (principal and interest) of rupees 5,130. But the plaintiff stipulated in his engagement for the payment of rupees 5,801, being an excess of rupees 671. This conduct on his part must be considered to be in violation of the regulations, as virtually engaging for interest, nearly at the rate of 24 *per cent*. Had the stipulation for interest not been excessive, the mortgage bond or deed of conditional sale would have been valid, but as the engagement is in direct violation of the provisions of regulation 15, 1793, the claim of the plaintiff is not admissible." The costs of suit were made payable principally by the plaintiff. Ramkeshoo Rai, being dissatisfied with the above decision, appealed from it to the Provincial Court of Dacca, and, dying shortly after the admission of the appeal, was succeeded in it by Ramruttun Das, guardian of his three minor sons. Further evidence having been taken with respect to the authenticity of the bill of sale, and to the fact of the purchase money having been delivered by Ramkeshoo to Moohummud Danish, and appropriated to the discharge of arrears of revenue; these facts were clearly established: and it appeared that Moohummud Danish died a month before the expiration of the term mentioned in the engagement, having remained in possession of the portion which he had sold to Ramkeshoo until his death. The Provincial Court reversed the decree of the Zillah Judge, observing that Ramkeshoo was entitled, under the deed of sale, to possession of the lands sold to him by Moohummud Danish, as the latter had never paid the sum stipulated in the engagement, nor even returned the purchase money with interest. The costs in both Courts were made payable by Moohummud Jaun, who, in the interim, had attained the age of majority, and he was directed to refund to the heirs of Ramkeshoo Rai the profits received by him out of the estate in question, from the institution of the suit to the date of passing the decree in the Provincial Court. The costs incurred by Jaun Moohummud, the farmer, were also made payable by Moohummud Jaun.

Moohummud Jaun Chowdhry, v. Ramruttun Das and others.

A further appeal was preferred by Moohummud Jaun to the Sudder Dewanny Adawlut. The appellant rested his case principally on the stipulation of illegal interest, which appeared in the engagement, and which, he contended, made void the deed of sale, nullified the whole transaction, and rendered the suit liable to dismission by the provisions of regulation 15, 1793, which limit the amount of interest on all sums whatever to 12 *per cent per annum*, if the cause of action shall have arisen on or after the 1st of January 1793, and the 9th section of which regulation has the following provision: "The Courts are not to decree any interest whatever in favour of the plaintiff, in any case where the cause of action shall have arisen on or subsequent to the twenty-eighth day of March, one thousand seven hundred and eighty, where a greater interest than is authorized by this regulation shall have been received, or stipulated to be received, if it be proved that any attempt has been made to evade the rules prescribed in it, by any deduction from the loan, or by any device or means whatever,

nor to give any other judgment, but for the dismissal of the suit, with costs to be paid by the plaintiff." The respondent, Ramruttun Das, argued, on the other hand, that there was no mention of interest in the engagement to bring it within the provisions of the regulation quoted; that the original plaintiff was a broker who dealt in money transactions; that he purchased the lands in question for the sum of rupees 4,401, and agreed to return his purchase on payment of rupees 5,801, at a stipulated period, allowing the seller to retain possession until the arrival of that period; and that the difference of the two sums mentioned in the bill of sale and in the engagement, was in consideration of the intermediate profits received by the seller during his possession, and not on account of interest. The Senior Judge (J. H. Harington), after a consultation with the Second and Third Judges, delivered his opinion in the following terms: "The transaction referred to in the bill of sale, and in the engagement, must be considered to fall within the provisions of section 8, regulation 15, 1793, which directs the forfeiture of interest on bonds or instruments executed on or subsequent to the 28th of March 1780, and specifying a higher rate of interest than is authorized by that regulation; as the stipulation in the engagement for the payment of rupees 5,801, on the 30th of *Jeyth* 1207, virtually in return for rupees 4,401, though nominally as the price to be paid in repurchasing the lands sold, was evidently a violation of the rules against usurious interest. Had the engagement not been registered publicly, along with the bill of sale, section 9, regulation 15, 1793, which directs the dismissal of the suit with costs, as well as forfeiture of interest in cases of an attempt to evade the regulation, would have been applicable. On the most favourable construction, taking the bill of sale and engagement as instruments relative to one transaction, and both publicly registered at the same time, the virtual engagement for interest, exceeding 12 *per cent per annum*, is illegal; and the original plaintiff in this suit, had he brought his action for principal and interest, could not have recovered more than the principal under section 8, regulation 15, 1793, which is clearly applicable to loans on *bye-bil-wufa* under the provisions of regulation 11, 1798; enacted for the prevention of fraud and injustice in conditional sales of land, under deeds of that denomination and other deeds of the same nature. Had Moohumud Danish, or his heirs, at any period before the 20th of *Jeyth* 1207, (the day specified in the engagement), tendered to Ramkeshoo, or, in conformity with section 2, regulation 1, 1798, deposited in the Zillah Court, the principal sum of rupees 4,401, he would undoubtedly have been entitled to keep possession of the 1 ana, 10 gunda, share of pergunnah Dhoorlau, specified in the bill of sale as having been transferred to Ramkeshoo, and that person would have been debarred from recovering any interest by the provisions of section 8, regulation 15, 1793. The only question is, whether tender or deposit not having been made, the conditional sale should be considered final and conclusive; or whether, a part of the transaction which included the loan, mortgage and conditional sale, being illegal, and Ramkeshoo not having demanded repayment of the sum advanced (which was his right),

1815.

Moohumud Jaun Chowdhry, v. Ramruttun Das and others

1815. but, possession of the lands, on the plea of the sale having become absolute, judgment should be given for the restitution of the sum advanced, with any and what interest? In determining this question, the Court is bound to consider the illegality of the original transaction, which, having clearly incurred a forfeiture of interest amounting to rupees 1,400, in part of rupees 5,801, must also be considered to vitiate the provisional sale of lands agreed to be transferred, in the event of the nonpayment of the principal and interest above mentioned. Appellant therefore should be reinstated in the lands adjudged by the Provincial Court to the respondent, and should make good to the latter the principal sum of rupees 4,401. It is difficult to say whether under the provisions of section 8, regulation 15, 1793, any interest should be adjudged to the respondent on the above principal sum and from what time? but had a judgment been given by the Zillah or Provincial Courts for the principal sum of rupees 4,401; interest from the date of such judgment would, on the confirmation of it by the Court (if not previously executed), have been receivable by the respondent under section 3, regulation 13, 1796. The appellant has agreed to relinquish to the respondent the mesne profits derived from his lands since the period of his dispossession, in pursuance of the decree of the Provincial Court. According to the original plaint, the annual assessment on the portion of the estate in question amounts to the sum of rupees 3,570, and the annual produce to rupees 4,105. The mesne profits therefore must amount annually to rupees 535, somewhat more than the legal interest at 12 *per cent* on rupees 4,401, which interest would amount to rupees 528 annually. On the whole, therefore, I am of opinion, that the decree of the Provincial Court should be amended; that the claim of Ramkeshoo Das and his heirs, to the lands specified in the bill of sale should be rejected; that the appellant should be reinstated in the possession of the lands delivered over in execution of the decree of the Provincial Court to the respondent, on behalf of the heirs of Ramkeshoo; that the appellant should at the same time pay to the respondent rupees 4,401; and that, as consented to by appellant, the profits derived by the respondent from the land during the period of his possession, viz. the net receipt, after paying the revenue of Government, and all charges, should be left with respondent, in lieu of interest on the principal sum of rupees 4,401. The parties should pay their respective costs in the three Courts." The Third Judge concurring in the above opinion, a decree was passed accordingly.

Moohum-
mud Jann
Chowdhry,
v. Ramrut-
run Das
and others.

NARAIN DAS, (Pauper), Appellant,
versus
 BINDRABUN DAS, Respondent.

1815.

May 10th.

ON the 19th of April 1806, the appellant Narain Das sued one Theekum Das, in the Zillah Court of Cuttack, to recover the superintendence of a religious edifice, situated in Pursootum Chutter; and to be reinstated in the management of the lands appropriated to its support, and the other appurtenances thereto. The decennial produce of the whole property was estimated at 55,500 rupees. The plaintiff set forth, that the superintendence of the religious edifice, and the lands in question, had descended to the plaintiff through a long line of ancestors; that Moujee Ram Das, the late superintendent, finding himself unable to attend to the concerns of the establishment on account of bodily infirmity, appointed the plaintiff to officiate in his place, as being the pupil of his spiritual disciple Rughoonath Das, who was absent; and consequently the person next entitled to succeed by right of representation to the inheritance; that he continued to officiate for ten years, during the life of Moujee Ram Das, and for one year and three months after the death of that person; which event happened in the *Umlee* year 1210; but that he was dispossessed by the defendant, who under pretext of a *hibbanama* or deed of gift, which he had fabricated, obtained an order of possession from the Collector. The defendant, in reply, alleged that the office in question was elective; that the late incumbent, Moujee Ram, nominated him as the person whom he wished to become his successor; and sent him several letters to that effect, requiring his consent; but that he, the defendant, being at the time intensely occupied in prayer and meditation, made no reply to the proposals; that Moujee Ram finding him disinclined, came personally to visit him; and having, after much entreaty, procured his consent to become superintendent, returned to the establishment, where he died in less than a month; that he left behind him a *hibbanama* (a) or deed of gift, in favour of the defendant, and entrusted the keys of the temple to one of the servants of the place; that the *hibbanama* was delivered to him, and by what means the plaintiff became possessed of the superintendence he knows not. It appeared in evidence, in the Zillah Court, that when the district of Cuttack came into the possession of the Company, the defendant produced the deed in his favour before the English Commissioners, to whom the plaintiff likewise presented a petition on the occasion. Orders were issued by those authorities for the appointment of a commission to investigate and arbitrate the claims of the parties, and to confer the office on whichever they should think best entitled to it. Ten of the neighbouring *Mohunts* were appointed for the purpose, five chosen by each claimant. The result of their investigation proved that the defendant, as nominee of the late incumbent, had the fairest claims to be chosen, and he was

(a) The word *hibbanama* in the original must be rendered *deed of gift*, though the document in question appears to have been rather in the nature of a will.

1815. accordingly elected by a majority of seven. It appearing to the commissioners, from facts which came out during the investigation, and from information received before and since, that the office of superintendent of the establishment in question was elective, they confirmed the election of the assembly constituted as above, and directed the Collector to make out a *sunnud* for his appointment, and he was installed with the usual formalities. On the 11th of July 1806, the Zillah Judge having inspected the orders of the Commissioners, founded on the election of the assembly, nonsuited the plaintiff, ordering, however, that the defendant should pay his own costs.

Narain
Das, v.
Bimdrabun
Das.

On the 20th of March 1809, a summary appeal against the above decision having been preferred to the Provincial Court of Calcutta, that Court were of opinion that the present question was not of the description contemplated in the provisions of regulation 16, 1793, as properly referrible to arbitration, and that the Commissioners were not competent to refer it to such a tribunal. They therefore reversed the order of nonsuit, and directed the Zillah Judge to try the cause on its merits. In pursuance of the above instructions, the Zillah Judge went into the merits of the case. It appeared that Moujee Ram, the late incumbent, had two pupils, Rughoonath Das and Jugunnath Das, who also had two pupils, Bhurut Das and the plaintiff. Of these persons Rughoonath Das had gone on a journey, but the other three resided at the temple. The Zillah Judge observed, that from the proceedings of the arbitrators, and other evidence which had been given in the cause, it appeared clear that the appointment of superintendent was elective, and that the succession of the disciple to the late incumbent was not a matter of course; but that, admitting such to be the case, the plaintiff could not benefit by such custom, as there were at that time two of the disciples of Moujee Ram alive, one of whom, the *Gooroo* of the plaintiff, would bar his claim; and would not, in the event of his death, be the means of establishing a right of succession in the plaintiff, he (the *Gooroo* himself) never having succeeded; that by the usage which prevailed in the establishment, the office of superintendent being elective, and the defendant having been duly elected by a competent assembly, he must be held to be the rightful successor. Judgment was therefore given for dismissing the claim of the plaintiff, with costs, if sufficient assets should subsequently be discovered in his possession. Narain Das being dissatisfied with the above decision, appealed from it to the Provincial Court, and, shortly after the admission of the appeal, filed the following documents, viz. an *ukhranameh* or acknowledgment, purporting to have been executed by Theekum Das, and resigning all right and title to the superintendence of the property in favour of the appellant; a *safeenameh* or deed of acquittance, purporting to have been executed by the same person, and renouncing all claims on the appellant; and a *razeenameh* or deed of compromise executed by the appellant, expressive of his satisfaction with the tenor of the above documents, and consequently of his willingness to relinquish the suit. These deeds appearing to be duly attested, were admitted by the Provincial

Court, and the Zillah Judge was directed to take measures for carrying the conditions of them into effect. Two months afterwards, however, Theekum Das presented a petition to the Provincial Court, setting forth that the documents filed by the appellant, Narain Das, were forgeries, and on a summary investigation there appearing reason to suspect that fraud had been practised, the Provincial Court, in conformity with the provisions of regulation 2, 1798, made an application to the Sudder Dewanny Adawlut for permission to revise their judgment, which application was complied with. Theekum Das having died about this time, Bindrabun Das came forward as his successor and representative, in virtue of a *hubbanameh*, whereby Theekum Das devised all his interest in the contested property to Bindrabun Das; and the authority of the above document being established, that person was permitted to defend the suit. On a more minute enquiry the following reasons appeared for rejecting the *ikrarnameh*, purporting to have been signed by Theekum Das, as a fabricated instrument. It was filed in the Provincial Court by Narain Das, and it did not appear to have been read and explained to Theekum Das, although written in the Persian language, which the latter did not understand; and, as, by the admission of the witnesses of both parties, he could not write, the said document could not have been signed by him. It bore the signature of five witnesses, namely, Luchmun Das, Bulram Das, Heera Das, Bancharam Mehtee, and Keshoo Das. Of these persons the two first had died, the evidence of Heera Das was inconsistent and incredible, and the two last deposed to having understood that the agreement between Theekum Das and Narain Das was, that the former should continue during his life to hold the office of *mohunt*, or superintendent, and that the latter should fill the inferior office of *adhikar*, or manager of the daily concerns of the temple. No sufficient cause or inducement appeared for Theekum Das having voluntarily, and in sound mind, executed a declaration to the effect of that exhibited by Narain Das, after he had obtained an award by arbitrators duly constituted, and a decision of the Zillah Judge in his favour: and moreover, his *vakeel* had refused to be the channel of filing that declaration in the Provincial Court, from a conviction that the agent of Theekum Das, who was an old man, illiterate, and unfit for business, had been imposed upon by the opposite party. The same objections existed against the validity of the *safeenameh* or deed of acquittance. Under these circumstances the Provincial Court, attaching no credit to the alleged compromise, annulled their former orders, and, considering the decision of the Zillah Judge to be just and proper, affirmed it accordingly with costs against the appellant. Orders were issued for the investiture of Bindrabun Das as *mohunt* or superintendent, in the event of no objection being urged by those of the same tribe, who, according to established usage, had the power of election and of confirming a nomination. On a further appeal to the Sudder Dewanny Adawlut that Court (present J. H. Harington and W. E. Rees) affirmed the decision of the Zillah and Provincial Courts for the following reasons: It appeared, from all the evidence that could be collected, that the office cou-

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1815. tended for, was clearly an elective one; that the assembly of electors was always composed of neighbouring *mohunts*; and that the nominee of the late incumbent was usually preferred. Theekum Das, it was proved, had been nominated by the late *mohunt*, and his claim to the succession had been adjudged by a competent tribunal delegated by the ruling power with full authority to elect. By the same tribunal, the claim of Naram Das had been rejected, he being unable to adduce any circumstance that could be recognized as conferring on him a fair title to the succession. The Court observed, that the only question which remained to be discussed, was, whether the deeds filed by the appellant in the Provincial Court were sufficient to establish his claim, notwithstanding the absence of any legal title. On this point the Court expressed their concurrence in the opinion of the Provincial Court, that these deeds had been fabricated, and observed that the presumption of fraud for the reasons assigned by the Provincial Court, was violent, and sufficient for their rejection. But independently of this circumstance, the Court remarked that, considering the established usage of elective succession, it might be questioned whether any relinquishment on the part of Theekum Das, however voluntary and unexceptionable, could vest any title in the appellant; and that it certainly could not operate as more than a mere nomination, to be confirmed by the usual mode of election. The decree of the Provincial Court was therefore affirmed, but it was declared not to be conclusive with respect to the respondent's claim of succession, under the devise of the late incumbent; his claim being, according to established usage, determinable by an assembly to be convened under the provisions of regulation 19, 1810, by the Board of Revenue; to the members of which Board a copy of the final decree in this case was transmitted for their information.

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1815. NEEK SINGH and ALRUK SINGH, Appellants,
versus
 May 22d. ANOOPUN DAS and GOVERDHUN DAS, Respondents.

A person officiating for a minor in the capacity of *tehsildar*, and borrowing money in his own name to discharge the public revenue, will be solely responsible

THE respondents, who instituted this action in the Benares Provincial Court, on the 9th of January 1811, were bankers, and had lent considerable sums of money to Neek Singh, to enable him to answer the demands on account of public revenue, made on him while officiating as *tehsildar* of Zuhoorabad and other pergunnahs. It appeared that Baboo Roop Singh, the former *tehsildar*, died in August 1800; and that in September following, the Collector issued a public notification that the office should descend to his son Alruk Singh. But this person being then a minor, Neek Singh, who, at the request of his mother had been appointed his guardian, was nominated by the Collector to officiate as *tehsildar* on his behalf. In 1810, Alruk Singh coming of age, applied for permission to manage the collection of the revenues personally, without the intervention of any other person, and in

compliance with that application, an order was issued for the removal of Neek Singh from his charge, and for the transaction of all future concerns connected with the revenue of the estate, directly with Alruk Singh, as *tehsildar*. An adjustment of accounts took place between Neek Singh and his bankers (the respondents) on the 5th of April 1810, when it came out that there was due from the former to the latter, the sum of 39,646 rupees, 3 anas, 3 pice. Neek Singh, not being able to satisfy this demand immediately, executed a bond, obliging himself to discharge the amount due, in four years, by half yearly instalments, bearing an interest of 12 *per cent* annually. He paid the two first instalments, amounting to 6,999 rupees, but failing in the performance of the remaining part of his obligation, he was sued by the obligees, who claimed, on account of principal due, the sum of 32,647 rupees, 3 anas, 3 pice, and 2,901 rupees, 3 anas, as interest from the date of the bond up to the period of instituting the suit; making the total claim of 35,548 rupees, 6 anas, 3 pice. Neek Singh contended, in answer to the claim, that he, since the discontinuance of his management, and since the period of Alruk Singh's taking charge of the office of *tehsildar*, could not be held responsible for a debt which had been contracted on account of the estate. The plaintiffs, on the other hand, argued, that as Neek Singh had engaged in his own name, as *tehsildar*, and had made no mention of his officiating for another, he alone should be required to satisfy their claim; but, with the view of securing their right, they presented a supplemental plaint, in which they requested that Alruk Singh also might be made a party to the suit, and he was accordingly summoned as one of the defendants. On the 16th of September 1812, this case was decided in the Provincial Court. From an inspection of the bond, it appeared, that in addition to the stipulated interest of 12 *per cent per annum*, the obligor had bound himself to pay an excess of 4 anas *per mensem*, under the denomination of *kussur*. The Judge (present C. Smith), although the excessive interest formed no part of the claim, considered the engagement to be evidently in violation of the regulations prohibiting usurious interest, and such as to subject the party, by whom such interest was stipulated to be received, to a forfeiture of all interest under the provisions of regulation 17, 1806. Interest was accordingly adjudged to be forfeited, and after deducting (on account of two instalments that had not become due on the date of the decree) the sum of 6,898 rupees, 7 anas, from the principal of the claim, the remainder, 25,748 rupees, 12 anas, 3 pice, was awarded to the plaintiffs, to be paid immediately by either or both of the defendants, who were left to settle the respective claims which each might have on the other at a future period; the Judge observing, that had Neek Singh, on his removal from the office of *tehsildar*, rendered up his accounts to Alruk Singh, and obtained an acquittance from him, or from the Collector, he would have been exonerated from all claims, and Alruk Singh would be solely responsible; but, that as no adjustment of accounts had taken place between them, it was uncertain from whom the amount was due, and that to keep the plaintiffs waiting until the adjustment were concluded would be injurious

1815. and unjust. The defendants were directed to contribute equally towards defraying the costs of suit.

Neek Singh and Alruk Singh, v. Anoopun Das and Goverdhun Das. On appeal to the Sudder Dewanny Adawlut (present J. H. Harington and J. Stuart) the above decree was amended. That part of it which awarded prompt payment of the debt to the plaintiffs was affirmed, and the two instalments which had become due in the interim were also made payable immediately, but the other part of it which subjected both the defendants to the same degree of responsibility was reversed. It was finally decreed that Neek Singh alone should be held answerable in the first instance, he having contracted the debt in his own name, and not having rendered an account of his management to Alruk Singh. It was further provided that, on an adjustment of accounts, should it be found that the amount adjudged against Neek Singh was really chargeable to Alruk Singh, he should be indemnified by that person for the sum so disbursed. Neek Singh was further directed to pay the costs, in both Courts, with interest on the sum adjudged by the Provincial Court, until payment should be made in conformity with the decree of the Sudder Dewanny Adawlut.

1815.

VAKEEL OF GOVERNMENT, Appellant,

versus

Aug. 30th.

RAJESREE DIBIA and Others, Respondents.

The claims of Government to lands included in the decennial settlement are subjected to the cognizance of the Courts of judicature, and no individual can be legally dispossessed from such lands unless a decree of Court has been given against him. Costs given against Government in a case where in this principle was not observed, THE plaintiffs in this case were Rajesree Dibia, widow of Gokul Chunder Ghosal and Huriecpaya Dibia. Parbuttee Dibia and Haimlutta Dibia, widows, respectively, of Ramnatain Ghosal, Hurreenarain Ghosal and Lukhinarain Ghosal, sons of the aforesaid Gokul Chunder Ghosal. The claim was for the recovery of the lands designated *Nouabad*, forming part of pergunnah Jynuggur, in the district of Chittagong, comprising 906 mouzas, measuring 11,583 *doons*, 10 *cowries*, 7 *gundahs*, 1 *cowrie* of land, and yielding an annual produce of 82,331 rupees, 8 anas, 5 *gundahs*, 3 *cowries*. The suit was instituted on the 15th of September 1804, in the Zillah Court of Chittagong; but was afterwards removed, by the operation of regulation 13, 1808, to the Provincial Court of Dacca.

The nature of the tenure of the Jynuggur zemindaree became a question before the revenue authorities, in consequence of certain remissions claimed by the zemindars on account of encroachments made by the sea. The family of Gokul Chunder Ghosal claimed the whole of the waste lands in the Province of Chittagong. The only documents to be found among the records of the Board of Revenue, which could give the least support to their pretensions were the two following:

1st. An extract from the proceedings of the Chittagong Council, under date the 12th of May 1761, to the following effect: "Taking into consideration the vast quantity of lands that have been laid waste for many years past, from the dissensions between the people of this Province and those of Arracan, and as an encouragement to every one who will undertake the clearing and cultivating those lands again, agreed that a proclamation be put

up; and that it be publicly declared throughout all parts of this Province, that whatever persons will undertake the clearing of such lands, shall, for the first five years, be excused all rents and taxes; that, at the expiration of that time, their rents are to commence at the usual rate of lands in every other part of this country; and that a guard shall constantly be kept there, to protect them from any insults of the Muggs or other foreigners. That, with a view to prevent disputes hereafter regarding the property of the lands when cleared, every person who shall engage to clear and cultivate them, shall first register his name in this office, and every month send an account of what quantity he has cleared, for which *pottahs* shall be immediately granted him."

2nd. An extract, from the proceedings of the same Council, under date the 19th of September 1763, in the following terms: "Jynarain Ghosal (Nephew of Gokul Chunder Ghosal), appears and informs the Court, that in consequence of the encouragement given on our arrival in this Province, for the clearance of the lands lying waste and in jungle, he undertook the clearing and cultivating the lands in many different places agreeably to the several different *sunnuds* granted him for that purpose; that most of those lands have already yielded revenue; and that the rest in a few months will do the same. As this person has been particularly industrious in the clearing of the new lands, which conduct has proved not only a benefit to himself, but has also been a great inducement and example to others; agreed, that as an encouragement to his industry, all such lands as have been cleared by the aforesaid Jynarain Ghosal be made a zemindaree, and be in future designated the *Nouabad* lands, forming part of the zemindaree of Chittagong, Jynuggur, Ordered also, that a *sunnud* be given to him for the same."

A reference having been made in the year 1796, to the Collector of the district, with a view to ascertain on what ground so great a claim as that preferred by the family of Gokul Chunder Ghosal rested, it appeared, from his report, that this person had been *Dewan* of the district of Chittagong in the time of Mr. Verelst; and that his family rested their claims on a *sunnud* alleged to have been granted to him by that gentleman. The Collector however observed, that after a most extensive search and careful examination of the records in his office, he could discover no trace of so comprehensive a grant having been made to the family of Gokul Chunder Ghosal, as that claimed by them, unless indeed an imperfect translation of an unauthenticated copy of an original *sunnud* in the name of Jynarain, nephew of Gokul Chunder, said to be in the possession of the family, could be considered as affording evidence of their title. He remarked, further, that such an instrument, if in existence, should be held as null and void, as from its being at utter variance with the proceedings of the Chittagong Council of a subsequent date, it must have been surreptitiously obtained by means of the unduly exerted influence of Gokul Chunder while acting in the office of *Dewan*. On the receipt of this information, the Board of Revenue required that the original *sunnud* should be produced; and Lukhinarain, son of Gokul Chunder, brought forward a grant issued under the private

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1815. seal of Mr. Harry Verelst, when that gentleman was the first member of the Chittagong Council, and dated 27th of *Ramzan*, in the first year of the reign of the Emperor Shah Allum, corresponding with the Bengal year 1166, and the English year 1760. The terms of it were of a most extensive nature, making over in the name of Jynarain Ghosal to Gokul Chunder Ghosal, his heirs and successors, the whole or nearly the whole of the lands which were then waste in the district of Chittagong, upon condition that he or they should pay revenue for such parts thereof as might from time to time be brought into cultivation, according to the established rates of assessment in that part of the country. This document was transmitted for the inspection of the members of Government, by whom it was considered to be a forgery, or to have been surreptitiously obtained. In communicating their orders to the Board of Revenue they expressed themselves as follows: "Without adverting to the circumstance of its wanting the necessary official attestation, on which ground alone it must be considered invalid, it is evident that this *sunnud* could not have been in existence when the Chittagong Council made the grant to Jynarain Ghosal in the year 1763, for, the latter deed grants only a part of what the grantee must already have acquired, had he been in possession of the *sunnud* dated in 1760. The two grants are obviously incompatible, and that of 1760, if the authenticity of the document be admitted, must be considered as virtually superseded by the subsequent grant in 1763, the authenticity of which cannot be doubted. The silence of the Chittagong proceedings with regard to the former *sunnud*, the incompetency of Mr. Verelst to make any such grant, and the objectionable nature of the grant itself, are also circumstances which strongly corroborate the presumption that the deed is a forgery; and as it is not authenticated by any official seal or signature (the private seal of Mr. Verelst being evidently of no authority whatever) we are only surprised that it could ever have been acknowledged as an authentic document. Under these circumstances, it is much to be regretted that so flagrant a fraud should so long have passed undiscovered; and that it should have received some sanction from the tacit acquiescence of Government, as well as of the individuals who were interested in detecting it. As, however, the persons who might reasonably be suspected of having been the original authors of the fraud are dead, no criminal process can now be instituted, with a view to establish the forgery, and it appears to us necessary only to determine in what manner the future operation of the deed shall be prevented. It may be presumed, that the Courts of justice will consider no length of time as sanctioning a fraud of this nature, but whatever may be the difficulty of proving it, or of contesting the right which may have been assumed under the deed in question, and heretofore admitted under an ignorance of the fraud, we are of opinion that every means should be had recourse to, for doing away the operation of it, as far as this can be legally effected. For this purpose we think it will be advisable to proceed as if no such deed were in existence; and we desire you will, as soon as possible, submit to us specific propositions, both with regard to the resumption and future settlement of any lands which may have

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been appropriated by the holders of the supposed grant, or by other individuals under *pottahs* from them. The heirs of the late Gokul Chunder Ghosal must of course be considered entitled to all the benefit of the resolution of the Chittagong Council in 1763; and if they should think proper to persist in the claims heretofore maintained by the family under the *sunnud* dated in 1760, it will be in their option to have recourse to the Courts of justice for the establishment of their rights."

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In order to carry into effect the above instructions of Government, it became necessary for the Board to communicate with the Collector of Chittagong, with a view to ascertain the precise tenure on which the lands stated to be included in the Jynuggur *zemin-daree* were held. From his report, it appeared that, although the lands belonging to the family of Gokul Chunder Ghosal by purchase, or inheritance, might be easily ascertained from the public records, yet those held under the alleged grant of 1760, and those held under the resolution of the Chittagong Council, did not admit of any such discrimination, from the circumstance of the whole having been brought on the books of the collectorship, at the time of the different measurements, under the general denomination of *Nouabad* lands; or rather from Gokul Chunder Ghosal's never having availed himself of the more limited resolution of the Chittagong Council at all; he being in possession of a general grant of the wastes. The Board, under these circumstances, made another reference to Government; observing that their orders, to proceed with respect to the Jynuggur estate as if no such *sunnud* as that alleged to have been granted in 1760 were in existence, would necessarily apply to all the lands called *Nouabad* in the Province. The Board observed, that the waste lands were of two descriptions: 1st, such as had been brought upon the measurement accounts as *kheelah*, and were easily reducible to a state of cultivation; and 2nd, such as were overrun with jungle, and of which no particular account had been taken. The Board further recommended to Government, as the simplest and best mode of proceeding, to grant through the Collector, a perpetual *pottah* for the cultivated and uncultivated lands which had already been brought upon the *jumma*, in favour of the dependant *talookdars*, by whom they were then held, on condition that the boundaries of the lands should be fixed by actual measurement, that such lands as had been reduced to cultivation since the last measurement should be brought upon the *jumma* of Government, and the assessment of the whole adjusted according to the rates observed in forming the assessment on the lands of other independent proprietors in the Chittagong district; by which means the *talookdars* would pay to Government exactly *pro rato*, what they then paid to the descendants of Gokul Chunder Ghosal; and the proportion of the produce received by the latter would accrue to Government. With respect to the other description of wastes, of which no account had been taken, the Board recommended that they should be granted, with fixed and ascertained boundaries, to individuals, in small and compact portions, according as applications might be made for them, on condition of their agreeing to pay revenue according to the established rates of assessment for such

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part them as might, at the expiration of three years, be reduced to a state of actual cultivation, and also a proportional increase, on the above principle, for such further quantity as might be afterwards brought into cultivation, whenever and as often as it might be thought advisable to set on foot an enquiry for the purpose of ascertaining that point. These propositions were approved of by Government, but previously to carrying the measures they involved into execution, the Collector was directed to allow the parties in possession a period of three months, to enable them to produce any documents which might serve to discriminate the lands held by them in virtue of the resolution of the Chittagong Council in 1763, and those held in virtue of the alleged *sunnud* of 1760. A delay of a longer period than that abovementioned having been afforded to the family of Gokul Chunder Ghosal, and they being unable to adduce any documents of the nature required, the whole of the *Nouabad* lands in the district were resumed in the year 1800 by the Collector; and arrangements were made for the disposal of them as recommended by the Board of Revenue and sanctioned by Government. Gokul Chunder Ghosal and his sons (except Jynarain, resident at Benares and supposed to have retired from the world) being at that time dead, their widows brought this action against the Collector for the recovery of the lands termed *Nouabad* appertaining to Jynuggur, estimating their extent and produce as before stated.

The plaintiffs set forth, that the lands in dispute had been in the possession of their family for a period of thirty-nine years previously to their dispossession: they filed the original *sunnud* of 1760, bearing the seal of Mr. H. Verelst, the proceedings of the Chittagong Council dated the 12th of May 1761, the proceedings of the same Council dated the 19th of September 1763, and the copy of a *sunnud* granted to Gokul Chunder Ghosal, in the name of Jynaram Ghosal, in pursuance of the resolution contained in the proceeding of the last mentioned date. This *sunnud* was dated on the 25th of September 1763, and recited that Jynarain had represented to the Council that he had obtained a *sunnud* for the whole of the waste lands in Chittagong, and that, from investigation and inspection of the *sunnud*, his representation appeared to be correct. This document was merely a confirmation of the former *sunnud*, and intended to be declaratory of his rights as zemindar of the *Nouabad* mehals. They also filed a decree of the Zillah Court of Chittagong, passed the 27th of March 1787, in a case where Gokul Chunder Ghosal's agent was plaintiff against Muddun Mohun and several other persons, who had taken out *pottahs* from the Collector for several of the *Nouabad* lands, but on investigation and reference to the *sunnud* of 1760, Gokul Chunder was declared absolute proprietor, and judgment was given accordingly in favour of the plaintiff.

The defendant, in answer, pleaded the invalidity of the *sunnud* of 1760; its repugnancy to the proclamation subsequently issued; the incompetency of Mr. Verelst to make such a grant; and the consequent inadmissibility of the *sunnud*, and decree (granted on the strength of it) as evidence of a title. The Second Judge of the Provincial Court, however, was of opinion, that the claim of

the plaintiffs was just, and decreed in their favour accordingly; observing that the authenticity of the latter *sunnud* (in which the validity of the former one of 1760 was recognized) had never been questioned; that therefore they ought both to be considered equally authentic, and consequently equally valid; and that the mere circumstance of the former instrument having been attested by a private seal only was not sufficient for its rejection.

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The Collector of Chittagong, under instructions from the Board of Revenue, appealed from the above decision to the Sudder Dewanny Adawlut, where it was reversed (present J. H. Harington and J. Fombelle), for the following reasons. The Court observed in their decree, that the original *sunnud* filed by the respondents in the Provincial Court was evidently a forgery, because it was dated on the 13th of May 1760, or A. H. 1173, whereas the Province of Chittagong had not at that period fallen into the hands of the Company; it having been ceded, together with the districts of Burdwan and Midnapore, for the support of the British troops in virtue of a treaty entered into with Casim Ally Khan on the 27th of September 1760, corresponding with the 17th of *Suffur* 1174, A. H.; that the *sunnud* bore only the private seal and not the signature of Mr. Verelst; and that the seal might have been surreptitiously affixed by Gokul Chunder Ghosal, to whose custody as *Dewan* it was most probably entrusted; that Mr. Verelst, without the assent of his colleagues, was incompetent to make such a grant; that it was incompatible with the proclamation issued by the Council on the 12th of May 1761, inviting all persons to come in and cultivate the waste lands, and allowing a remission of five years rent as an encouragement to industry; that it was totally at variance with the proceedings of the Chittagong Council dated September 19th, 1763, stating the representation of Jynarain himself concerning certain reclaimed lands and directing that they should be annexed to the Jynageur estate by *sunnud*; that the instrument produced as the *sunnud* granted in pursuance of the resolution contained in the above proceedings, in no way conformed to the tenor of that resolution; and that being only the copy of a copy it could not be received in evidence. Leaving out of the question therefore these *sunnuds*, which the Court determined were not admissible as evidence, there remained only two grounds on which the respondents could rest any claim; one, the proceedings of the Chittagong Council dated September 19th, 1763, containing a resolution to grant to Jynarain a *sunnud* for all the lands brought into cultivation by him up to that date; the other, the provision contained in section 14, regulation 3, 1793, and section 2, regulation 2, 1805, prohibiting the trial of suits the cause of action in which may have arisen before the 12th of August 1765, the date of the Company's accession to the *Dewanny*. This provision of the regulations the Court, on an equitable construction, considered applicable to this case, notwithstanding that the persons in whose favor it was to operate had themselves brought the action, as it was obviously unjust that they should suffer any disadvantage from their having been informally dispossessed instead of having been regularly sued. From the Collector's report, transmitted to the Board of Revenue

1815. in the year 1797, it appeared that, according to a measurement made in the year 1764, (previously to the Company's acquisition of the *Dewanny*), the total quantity of lands annexed as *Nouabad* to the zemindaree of Jynuggur amounted to 3,501 *doons*, 9 *cawnies*, 3 *cowries*; and the Government dues on those lands (after deducting the proprietary perquisites), were rated at 5,871 rupees. The original documents relative to the measurement and assessment not having been filed, the Court abstained in their decree from specifying the precise quantity of lands to be recovered by the respondents, but adjudged that they should recover so much as might be ascertained to have been in the year 1764, the undoubted property of their family; and that, after deducting the public dues from the produce of the said lands, whatever excess had been appropriated by Government or individuals, should be refunded to them. The decree concluded by awarding the costs of suit in both Courts to be paid by Government, as in disposing of the respondents from lands subsequently to the decennial settlement, without having recourse to a judicial proceeding, the public officers had deviated from the spirit and intent of the regulations, as contained in the preamble to regulations 2, and 3, 1793, wherein it is expressly provided, that all questions connected with the financial rights of Government shall be subjected to the cognizance of the regularly established Courts of judicature.

1815. VAKEEL OF GOVERNMENT, MEER ASHRUF ALI and
 HUFEEZ OOLAH, Appellants,
 Nov. 25th. *versus*
 MUSSUMMAUT KISHOREE, Respondent.

Property, supposed to belong to a public defaulter, being attached and about to be sold, in satisfaction of dues of government, should another person claim that property, it is sufficient that previously to the sale a summary enquiry be made into the merits of the claim.

EARLY in the year 1815, Surroop Chund, treasurer of the Collector of Dacca Jelalpoore, became a defaulter in a very considerable amount, and absconded. The sum claimed amounted to 148,245 rupees, his property was represented by Meer Ashruf Ali and Hufeez Oollah, two of the appellants who had become his sureties, as lying chiefly in the City of Dacca; and the Collector, in conformity to the provisions of section 16, regulation 3, 1794, made an application, through the Vakeel of Government, to the Judge of the City, to attach such of his property as might be forthcoming. His estate, real and personal, as pointed out by the sureties, was attached accordingly. An order was issued by the Board of Revenue for its being put up to public sale in the event of its not being claimed as the property of any other person. In the mean time Mussumaut Kishoree, the respondent, preferred a claim in the Zillah Court, to one-third of the estate under attachment, real and personal, amounting in value to the sum of rupees 16,000, as being the share to which her late husband Meghoo Sah, uncle of and joint proprietor with the defaulter Surroop Chund, was entitled. The Zillah Judge instituted a summary enquiry; the result of which not establishing the plaintiff's right, her suit was dismissed, and the sale was ordered to be proceeded on. An appeal having been preferred to the Provincial Court from this decision, the Judges of that Court expressed themselves of opinion

that the slightest objection was sufficient to stop a sale; and the City Judge was directed to report on what grounds he had made a summary enquiry into the claim of the appellant; as well as to issue orders for the suspension of the sale. This was done accordingly, and the City Judge, in furnishing an explanation of the grounds of his proceeding, observed, that in attaching the property he had acted in obedience to the provisions of section 16, regulation 3, 1794, which directs Judges of cities to attach property of certain native officers, therein referred to, and to deliver it into the charge of the Collector, on the receipt of application to that effect; that this necessarily involved an enquiry into the truth of a claim urged on the plea that the property attached did not belong to the defaulter; that in the execution of decrees, it is the established usage to examine summarily claims to property attached in execution; and that the order of the Board of Revenue, in the present instance, was considered as analogous and equal in authority to a judgment of Court. This explanation was not however satisfactory to the Judges of the Provincial Court; who were of opinion that a summary enquiry was not applicable to such a claim as that preferred in the present instance; because, if, in consequence of it, property were sold, and if, on a subsequent and more full investigation it should be ascertained that the property sold did not belong to the defaulter, there would be a difficulty in restoring it to its rightful owner. The order of the City Judge was therefore rescinded; and directions were issued for the suspension of the sale, until it should be determined by a regular suit and complete investigation, that the claim of the appellant was unfounded in right. This decision was appealed from to the Sudder Dewanny Adawlut, the final decree of which Court (present J. H. Harington and R. Ker) was to the following effect: "The reasons assigned by the City Judge are sufficient to warrant his having made a summary enquiry. If the principle assumed by the Provincial Court (that a mere claim of right, to property attached for sale, without evidence of actual proprietary possession, should prevent the sale till the claim be ascertained and decided by a regular suit,) were established, no public sale whatever, in satisfaction of the dues of Government, could take place without the greatest delay, expense and inconvenience. The regulations have not prescribed any positive rule applicable to the case. But it is the established usage, in execution of decrees, if a claim be set up to any property attached for sale, to investigate summarily the grounds of the claim: and to be guided by an equitable consideration of the result, in making sale, or not, as may appear proper; leaving the dissatisfied party to a regular suit. If the land houses, or other property sold, as belonging to A, be proved on a regular suit to belong to B, the sale being restricted to the rights and interests of A, those of B cannot be affected thereby, and the possession must revert to B.

The orders of the Provincial Court were on these grounds reversed, and that Court was instructed to decide on the merits of the enquiry made by the City Judge. (a)

(a) In the fifth clause of the 29th section of regulation 7, 1799, treating of public sale, there is the following provisions: "If any other person not being,

1815.

A formal investigation is not in the first instance necessary. But it is at the option of the claimant to institute subsequently a regular suit; and if his title be proved the sale will be void, and the property adjudged to him, with costs.

1816.

BEHOREE GYAWAL, (Son and Heir of SHUHUR CHUND
GYAWAL, deceased) Appellant,

Jan. 17th.

versus

MUSSUMMAUT DEEPOO (Widow of RUGHOOBEER DEEHA),
Respondent.

Pilgrims to Gya are at liberty to choose their own *kurhwa* or conductor, who will enjoy the emoluments arising out of the office, notwithstanding any claim of right to officiate in that capacity set up by another person.

THIS was an action brought by Rughoobeer Deeha (late husband of the respondent) in the Zillah Court of Behar, on the 16th of January 1800, to recover from Hukkum Chund, grandfather of the appellant, the sum of 52,186 rupees. The plaintiff, who was an inhabitant of Gya, stated, that he left that place in the year 1196, F. S. or 1789, A. D. and proceeded to Nagpore, where he established himself as *Kurhwa*, or chief conductor of pilgrims; that in virtue of this office he became entitled to receive the *dukhna*, that is to say, all the presents given for religious purposes to their conductors by persons performing the pilgrimage, but that after he had been for three years firmly established, the defendant usurped his place, and accompanied the Raja of Nagpore and his train on a pilgrimage to Gya, receiving money and effects presented on that occasion, amounting in value to the sum specified in the claim. The defendant, after admitting that the plaintiff had been in the year 1196 established in Nagpore as *Kurhwa*, alleged in reply, that having in the year 1199, immediately before the Raja's pilgrimage, left Nagpore and gone to another village, where he joined the society of Shuhur Chund, son of the defendant, he had incurred the loss of his office. That after his departure, he (the defendant) became regularly nominated by a society of *Gyawals* to be *Kurhwa*, and that in virtue of the office so conferred on him, he had accompanied the Raja to Gya, and performed, during the journey all the religious ceremonies customary on such occasions, and received the presents and charitable offerings bestowed by the Raja and his attendants. That from the property so received he had deducted his own proper share, and distributed the remainder according to usage, among the inferior *Gyawals* who were of the society.

This case had, seven years back, been preferred by the plaintiff to Mr. Seton, then Judge. It was sent to be arbitrated by two persons who gave opposite opinions, and a third arbitrator was chosen by the consent of both parties, to decide. This person decided in favour of the present plaintiff, but, in consequence of some objections urged by the defendant, the Judge refused to enforce the judgment of the arbitrator, but left the plaintiff to bring a regular action. In the mean time the defendant had returned to Nagpore with the Raja, and on his re-appearance in

the late incumbent, or his representative, shall claim any part of the property sold, and delivered over to the purchaser, he is at liberty to institute a suit against the former incumbent and purchaser jointly, for the recovery thereof, and on proof of his right shall receive back the same with costs and damages from the late incumbent; who shall further, in such case, if the property adjudged were clearly included in the sale, be compelled by the Dewanny Adawlut to make reparation to the purchaser adequate to the loss sustained by him; either by a refund of a proportion of the purchase money, or otherwise, as may appear just and equitable."

Behar, after an interval of seven years, this suit was brought forward. From the evidence taken by the arbitrators from persons conversant with the usages of that class of people termed *Gyawals*, the following appeared to be among the rules of their institution: If a *Gyawal* or inhabitant of Gya, leave his native place, and settle in another village where there is no person of the same description with him, he becomes *Kurhwa* or chief conductor of the pilgrims from that village. Those *Gyawals* who subsequently arrive there, are admitted into his society and share the emoluments subject to the following conditions: If the *Gyawal* arrive during the season termed *ritoo*, that is to say, the period of thirty-five days between the first day of the *dussarah* festival, and the full moon of the month *Cartick*, and then demand admittance into the society, he becomes entitled to the benefits of partnership even against the inclination of the *Kurhwa*, nor is it necessary that such *Gyawal* should accompany the *Kurhwa* and pilgrims to Gya in order to entitle himself to a share of the emoluments. If he arrive during the season termed *kooritoo*, which signifies any time during the remaining ten months and twenty-five days of the year, he must, in order to be admitted into the society and participate in the emoluments, either obtain the consent of the *Kurhwa* for admission, or accompany that person and the pilgrims to their destination. The *Kurhwa* is entitled, in virtue of his office, to an excess upon his share of the profits equal to one-half the share received by each individual *Gyawal*; but it is a rule, that if he once leave the place where he had established himself (which place is termed his *menda*) and enter into a society elsewhere, he forfeits the office.

The only witnesses brought forward to prove that the plaintiff, Rughoobee Deeha, had incurred this forfeiture, were Shuhur Chund, son of the defendant, with whom he was alleged to have formed a partnership, and some other *Gyawals*, who were confessedly in the interest of the defendant, and whose testimony was therefore not to be relied on, besides which, it was invalidated by the extreme improbability of the plaintiff's having left Nagpore at the very time when the office was about to become so lucrative from the circumstance of the Raja's projected pilgrimage. As the defendant therefore had admitted that the plaintiff once filled the situation of *Kurhwa*, there did not appear to the Zillah Judge any valid reason for supposing his interest to have become extinct.

From the most authentic accounts that could be procured, the sum computed to have been received as *duchhna* during the Raja's pilgrimage, amounted to 39,650 rupees. Of this sum a share and a half, or three-fifths, viz. 23,790 rupees were adjudged to the plaintiff, and two-fifths, or 15,860 rupees, to the defendant, as it appeared from the evidence that he had been regularly received into the society of the *Kurhwa*; but it was not considered proper to make any deductions from the sum adjudged to the plaintiff, on the plea of the defendant (that he had after deducting his own share distributed the remainder among the *Gyawals* who had accompanied him), inasmuch as those persons had not performed the requisite conditions, and were not entitled to any part of the profits; the defendant, by whom they were received as partners, and whom they accompanied in the pilgrimage, not being himself

1816.

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1816 competent to officiate in the capacity of *Kurhwa*. Interest was not charged, but in lieu of it the defendant was directed to pay all costs. The original defendant having died, was succeeded by his son and heir Shuhur Chund, who being dissatisfied with the above decision, appealed from it to the Provincial Court, but it was affirmed on the grounds stated by the Zillah Judge. While the cause was pending in this Court the plaintiff, Rughoobeer Deeha, demised, and the appeal was defended by his widow Mussumaut Deepoo.

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aut Dee-
poo.

Shuhur Chund preferred a further appeal to the Sudder Dewanny Adawlut, but dying immediately after its admission, his son Behoree Gyawal prosecuted the suit. The case came on at first before the Fourth Judge (R. Ker) who expressed himself decidedly of opinion that the decrees of the Courts below should be reversed. He observed, that it was an undisputed fact, that Hukkum Chund, the original defendant, had accompanied the Raja on his pilgrimage from Nagpore to Gya, had performed all the rites and ceremonies usual on such occasions in the capacities of *Kurhwa* and *Purohit* or family priest, had received the *duchhna*, and had, according to usage, distributed shares of it among the other *Gyawals*, his companions. He considered the claim of Rughoobeer Deeha, founded on the allegation of his being the real *Kurhwa*, to be totally inadmissible, and that the Raja and his attendants had obviously a right to select whomsoever they thought proper, to do the duties of that office. The case was however reserved for the consideration of another Judge. On the 17th of January 1816, the Senior Judge (J. H. Harington) having inspected the proceedings, expressed his concurrence in the opinion of the Fourth Judge, and the decrees of the Courts below were accordingly reversed; but it appearing that the plaintiff had accompanied the Raja in his pilgrimage, and that although entitled, he had received no share of the profits, and the appellant agreeing to pay the costs in all the three Courts, on the condition that no further claim should be preferred against him on this account, he was directed to discharge them accordingly; as this arrangement appeared to be equitable to both parties, and, on calculating the sum she would have been entitled to receive, on the whole, rather advantageous to the respondent.

GOCUL CHUND CHUCKERWURTEE, Appellant,

1816.

versus

MUSSUMMAUT RAJRANEE and JYE GOPAUL CHOW-
DHRY, Respondents.

Jan. 27th.

THIS was an action brought by Gocul Chund Chuckerwurtee and his late brother, Ram Mohun Chuckerwurtee, in the Zillah Court of the twenty-four pergunnahs, on the 1st of October 1806, against Mussumaut Rajraanee and Jye Gopaul Chowdhry, to recover 39 beegas, 9 biswas of land; the value of which, reckoned at 10 years produce, was laid at 513 rupees, 12 anas.

It was set forth in the plaint, that their cousin Ram Soondur Chowdhry (late husband of Mussumaut Rajraanee) in 1199 B. S. died childless; that his widow having been expelled from her tribe and thereby excluded from inheritance, his property, ancestral and acquired, devolved on them as his legal heirs; that they accordingly took possession of the contested lands and remained in possession of them until 1212, B. S. when Mussumaut Rajraanee sold them to the defendant Jye Gopaul Chowdhry, by whom they were dispossessed; and that the present suit was brought for the revocation of that sale, and for the recovery of the lands in question. The defendant, Mussumaut Rajraanee, in her answer, denied that she had been expelled from her tribe and excluded from inheritance, and affirmed that on the demise of her husband she had succeeded to his estate, both ancestral and acquired. She admitted to have sold the lands in question, but maintained that she had a right to make such sale.

Jye Gopaul Chowdhry, the other defendant, after denying in general terms the truth of the allegations set forth in the plaint, pleaded his right to possession under the deed of sale executed by Mussumaut Rajraanee in his favour on the 13th Jeth 1212, B. S. which was in substance as follows: "I, Mussumaut Rajraanee, being a female, and incompetent to manage the estate which devolved to me on the decease of my husband, do hereby sell the same to you and your heirs for the sum of 513 sicca rupees, 12 anas."

The Zillah Judge, on a reference to his Hindoo law officer, received an opinion, that a widow, on whom her husband's estate has devolved, may alienate the same by sale or otherwise for her own maintenance or for the obsequies of her husband.

On the grounds of this opinion, and of its not appearing to be in any wise established by the evidence adduced by the plaintiffs, that Mussumaut Rajraanee had been expelled from her tribe and excluded from the heritage of her husband; the claim was dismissed in the Zillah Court, with costs.

After an appeal had been preferred from the above decision to the Provincial Court of Calcutta, Ram Mohun Chuckerwurtee, one of the plaintiffs, demised, and his heirs did not prosecute the appeal. That Court concurring in the Zillah decree, confirmed it, and dismissed the appeal with costs.

The Court of Sudder Dewanny Adawlut judged it proper to admit a special appeal from the above decisions in consideration of the reply of their Hindoo law officers to the following question previously put by them:

The widow of a childless Hindoo, taking the entire estate of her husband, is restricted from alienating the same by sale or otherwise, except for the obsequies of her husband, or for her maintenance, unless with the sanction of her husband's heirs.

1816.

Gocul
Chund
Chucker-
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Mussum-
maut Raj-
ranee and
Jye Gopaul
Chowdhry.

Question : The widow of a childless Hindoo, notwithstanding that heirs of her husband are alive, sells the entire immoveable estate of her husband to a stranger, without obtaining the previous sanction of those heirs, and assigns, as her reason for selling the estate (the only reason assigned by Mussummaut Rajranee for selling her husband's estate) that she is incompetent to manage it. Is such sale under the *shasters* valid or otherwise?

The reply of the law officers to the above question was as follows : " A woman cannot sell her husband's immoveable estate to a stranger, except for the completion of her husband's funeral rites or for her own maintenance, unless with the sanction of her husband's heirs, to whose control she is subject, and on whom on her demise the succession will devolve; should Mussummaut Rajranee have sold the estate merely on the grounds alleged in the deed of sale, such sale under the *shaster* is invalid."

The Court (present R. Ker) passed (in substance) the following judgment: " It appears that the contested lands belonged to Ram Soondur Rai, the husband of Mussummaut Rajranee and cousin of appellants, who are his nearest heirs; that on the demise of Ram Soonder the succession to his property vested in Mussummaut Rajranee; that the appellants have failed to establish that Mussummaut Rajranee had been expelled from her tribe, and excluded from the heritage of her husband; and that Mussummaut Rajranee on the 13th *Jeth*, 1212, executed a bill of sale in favour of the respondent Jye Gopaul Chowdhry for the contested lands, assigning therein as her only reason for selling the estate, her incompetency to the management of it: it further appears that no tidings have been heard of Mussummaut Rajranee since the institution of the suit in the Zillah Court in 1806, at which time she repaired to Benares; that the sale of the contested lands merely for the reasons assigned by Mussummaut Rajranee is invalid under the Hindoo law; and that the pundits being called upon to declare in whom, under the above stated circumstances, the possession of the contested lands vested, have this day given their opinion that in consequence of Mussummaut Rajranee not being forthcoming, the appellants, her husband's heirs, are entitled to manage and receive possession of the same. It is accordingly decreed that the decision of the Courts below be amended, and ordered that the sale be annulled; that the contested lands be placed as a deposit with the appellants until Mussummaut Rajranee be forthcoming; that in the event of her being forthcoming, provided she may not have committed any act involving expulsion from her tribe and exclusion from inheritance, the appellants give her immediate possession, and render to her accounts of the mesne profits; that Jye Gopaul Chowdhry defray the costs in each of the Courts; and that he retain possession of all the profits accrued during the period he was possessed of the estate."

RAJA SHUMSHERE MULL, Appellant,

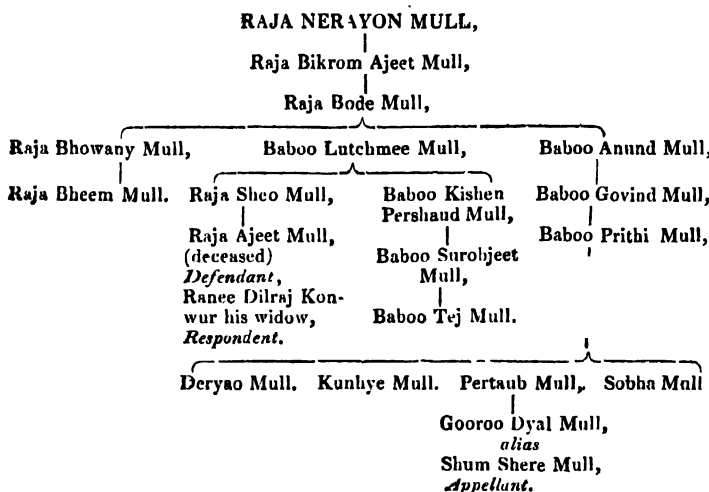
1816.

versus

RANEE DILRAJ KONWUR (Widow of RAJA AJEET MULL, deceased,) Respondent. Jan. 31st.

THIS was an action brought by Shum Shere Mull, in the Zillah Court of Goruckpore, on the 10th of August 1805, against the late Ajeet Mull, for the recovery of the *raj* and *zemindaree* of current in Mujhoolee; of which the annual produce was estimated at 13,843 rupees. The subjoined sketch of the family of the parties will tend to elucidate the case:

According to the Hindoo law as current in Benares an adoption made by a widow without authority from her husband is illegal, and the adoption of an only son is invalid unless the natural father deliver his son to the adoptive father on condition that he should belong to them both as a son, and the latter accept and adopt him on that condition. A childless widow is not entitled to succeed to the estate of her husband, which devolved entire on him from his ancestors, to the exclusion of his brothers.



The Plaintiff claimed the *raj* and *zemindaree*, setting forth in his plaint, that by the custom of the family it was not divisible, but on the death of the Raja for the time being, he was always succeeded by his eldest son, to the exclusion of the other branches of the family; that from Raja Nerayon Mull the estate had devolved regularly to his descendants until it fell to Raja Bheem Mull; that on his demise in 1153, F. S., his widow Ranee Bukht Konwur adopted his (plaintiff's) father as her son, and made him proprietor of the *raj* and *zemindaree*; that his father in 1201, F. S., in the presence of a large assemblage of people, conferred on him the *tilok*, or badge worn by the Rajas, and appointed him to the *raj* and *zemindaree*; that he remained in possession thereof until 1204, F. S., when in consequence of a robbery being committed within the limits of his estate he was summoned to appear before the *Nuwab* at Lucknow, and was there unjustly detained in confinement for seven years; and that the defendant during this interval took possession of the estate, and at the formation of the decennial settlement for the Provinces ceded by the *Nuwab* in 1801, stood forth as proprietor, and entering into engagements with Government had wrongfully held possession ever since.

1816. The defendant, in answer, after denying the claim of the plaintiff in general terms, stated, that as Raja Bheem Mull died childless, the estate in dispute had devolved on his father Raja Sheo Mull son of Baboo Lutchmee Mull, the second son of Raja Bode Mull; that on his father's demise he succeeded to it, and had enjoyed uninterrupted possession of it during a period of 53 years; and that neither the plaintiff nor his father possessed any claims to the estate. Raja Ajeet Mull demised at this stage of the proceedings, and the suit was defended by his widow Ranees Dilraj Konwur, who filed a petition shewing that her husband Raja Ajeet Mull had adopted as his son Tej Mull, the only son of Baboo Surobjeet Mull.

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shere Mull,
v Ranees
Dilraj
Konwur.

It being admitted by both parties, that from Raja Bode Mull the estate had devolved entire to Raja Bhowany Mull, and on his demise to Raja Bheem Mull his son, to the exclusion of Baboos Lutchmee Mull and Anund Mull, who were merely allowed a maintenance from the estate; and it appearing from the evidence adduced by the plaintiff as to the adoption of his father Pertaub Mull by Ranees Bukht Konwur, that the adoption had been made by the said Ranees without any permission to adopt obtained from her husband, and merely with the sanction of her husband's relations; the Zillah Judge made a reference to the pundit of his own Court, and to that of the Provincial Court of Benares, to ascertain whether such an adoption was legal and valid or otherwise, under the *shasters* current in Goruckpore, and further to ascertain, in the event of the adoption being invalid, in which of the heirs of Raja Bode Mull the succession to the estate held by Raja Bheem Mull legally vested on the demise of Bheem Mull, Baboos Lutchmee Mull and Anund Mull, and their sons Kishen Pershaud Mull and Govind Mull having deceased previously to that event: In answer to this reference, it was stated by the pundits, that the adoption having been made by Ranees Bukht Konwur, without the assent of her husband, was invalid, and that the plaintiff, as heir of his father, had therefore no claims to the estate, the succession to which, Bheem Mull having died childless, legally vested in Raja Sheo Mull, son of Lutchmee Mull, and nearest surviving heir of Bode Mull, and on his decease in his son Raja Ajeet Mull: The claim of the plaintiff was accordingly dismissed with costs.

On appeal by the plaintiff from the above decision to the Provincial Court of Benares, that Court concurred in it, and dismissed the appeal with costs.

On a further appeal by the claimant from the above decision to the Sudder Dewanny Adawlut, that Court, after consideration of the proceedings held in the lower Courts, directed that the *vyavasthas* delivered by the pundits of those Courts, and a genealogical table of the family of the parties should be laid before their pundits for an exposition of the Hindoo law on the points which appeared material to the case, as contained in the following questions:

Question 1st, If a widow, without authority from her husband, adopts a son, is such an adoption legal and valid under the *shasters* current in Goruckpore, or otherwise, and can or cannot appellant, as heir of his father Pertaub Mull, adopted by Ranees

-Bukht Konwur, without authority from her husband, maintain any right to the estate? 1816.

2nd, If the adoption of Pertaub Mull be invalid, on the demise of Raja Bheem Mull, who was the legal heir to the estate? Raja Shumshere Mull, v. Ranees Dilaraj Konwur.

3d, On the death of Raja Ajeet Mull does his widow, the respondent, succeed to the *raj* and *zemindaree* which descended entire to him from his ancestors; and if, as alleged by her, Ajeet Mull, her husband, adopted as his son Tej Mull, the only son of Surobjeet Mull, will Tej Mull succeed to the estate during the lifetime of the widow, or not until after her demise?

4th, If the adoption of Tej Mull be illegal, in which of the descendants of Raja Bode Mull will the succession to the *raj* and *zemindaree* vest on the demise of the respondent?

The answers returned by the pundits to these questions were as follow:

Answer 1st, It is written in the *Veeru Mitroduyu* and *Sunskar Kuostoobha*, that it is lawful for a widow to adopt a son without authority from her husband, provided she obtain the consent of her husband's heirs, but as this doctrine is over-ruled in the *Dattaca Mimansa*, a treatise of greater authority, the adoption of Pertaub Mull, by Ranees Bukht Konwur without authority from her husband, Raja Bheem Mull, is illegal and invalid under the *shasters* current in Goruckpore, and such adoption being illegal, the appellant, as heir of his father Pertaub Mull, cannot maintain any claim to the estate in dispute.

2nd, The adoption of Pertaub Mull having been declared illegal, the succession to the estate in dispute, which from Raja Bode Mull devolved in succession to Rajah Bheem Mull, on the demise of Raja Bheem Mull vested in Raja Sheo Mull, son of Baboo Lutchmee Mull, and nearest surviving heir of Raja Bode Mull, and on his death in his son Raja Ajeet Mull.

3d, The *raj* and *zemindaree* having descended entire and without partition to Raja Ajeet Mull from his ancestors, his widow can maintain no right to possession of it during her lifetime, because according to the *shasters* current in Goruckpore, a widow is only entitled to the portion of the ancestral estate, which on a partition may have fallen to her husband, and the adoption or gift of an only son is illegal under the *shasters* current in Goruckpore: If, therefore, Surobjeet Mull made a gift of his only son Tej Mull to Raja Ajeet Mull, and the latter adopted Tej Mull as his son, such adoption is illegal, and under this adoption Tej Mull has no right to possession of the estate either during the lifetime or after the demise of the respondent: If, however, Surobjeet Mull delivered Tej Mull to Ajeet Mull on the condition that he should belong as a son to them both, and Ajeet Mull accepted him on this condition, and adopted him in the manner ordained in the *shasters*, such adoption is good and valid, the son so adopted being denominated *Dwya Mushyayana*, or son of two fathers, and under such an adoption Tej Mull is legally entitled to receive immediate possession of the estate, and during the lifetime of the respondent.

4th, If the adoption of Tej Mull by Ajeet Mull be invalid under the *shasters*, the succession to the *raj* and *zemindaree* in dispute will, on the demise of the respondent, devolve on the nearest surviving heir of Bode Singh.

1816. The principal authorities cited by the pundits in their *vyuvusthas* were the following texts :

Raja Shum-
shere Mull,
v. Rane
Dilraj
Konwur. In support of answer 1st, *Dattaca Mimansa*, *Vasishttha* having said, " Let not a woman give or accept a son unless with the assent of her lord," it is evident that a widow cannot, unless with the assent of her husband, adopt a son : It has been argued that this text is applicable solely to women whose husbands are alive, and not to widows, the wife alone being under control of the husband ; to this it is answered, the word "woman" is to be taken in a general sense, and applied equally to a widow as to a wife, both being under control, the widow under that of the husband's kindred ; to this it is urged in reply, that a widow consequently may adopt a son with the assent of her husband's relations ; but such a doctrine would be manifestly absurd, for if she could, with the consent of her husband's kindred, adopt a son, the word " husband" must necessarily bear the sense of kindred, which it does not ; and a son so adopted could not confer any benefit on the deceased husband, being adopted without his consent, whereas, a son adopted by a widow with the consent of her husband, is in truth the son of her lord.

In support of answers 2nd, and 4th, *Mitacshara*, " To the nearest *sapinda* the inheritance next belongs."

If there be not even a brother's son, the estate devolves on the paternal kindred, who are *sapindas*, which relation includes the descendants of a paternal ancestor to the sixth degree, and ceases with the seventh person ; in default of *sapindas*, on the *samanodacas*, or those connected by a common libation of water, and those are, the more distant paternal kindred extending to the fourteenth degree, and on failure of *samanodacas* to those termed *bandhu* or cognates.

In support of answer 3d, *Mitacshara*, " It is a settled rule that a wedded wife being chaste, takes the whole estate of a man, who being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue."

Vasishttha has said, " Let no man give or accept an only son, he must remain to raise up progeny for the obseques of ancestors." *Dattaca Mimansa*, " Let no man make a gift of an only son."

Smriti, " An only son belongs to the natural father, the sale or gift of such a son is invalid."

Dattaca Mimansa. " The son of two fathers, *Dwyamushyayana*, is of two sorts. *Nityo Dwyamushyayana* and *Onityo Dwyamushyayana*. The first is an only son given by his natural father to his adoptive father under an agreement to this effect, " He shall belong to us both."

When a son may be initiated under the family name of his natural father into the ceremony of tonsure, and when the other rites of initiation, as the investiture with the *poita* or thread, &c. are performed by the adoptive father under his family name, as the rites of initiation have been performed by both fathers, he is termed *Onityo Dwyamushyayana*. *Yajnyawalkya*, " The legitimate son is one procreated on the lawful wedded wife. Equal to him is the son of an appointed daughter. The son of the wife is one begotten on a wife by a kinsman of her husband, or by some other relative. One secretly produced in the house, is a son of

hidden origin. A damsel's child is one born of an unmarried woman; he is considered as son of his maternal grandsire. A child begotten on a woman whose (first) marriage had not been consummated, or on one who had been deflowered (before marriage) is called the son of a twice married woman. He whom his father or his mother give for adoption shall be considered as a son given. A son bought is one who was sold by his father and mother. A son made is one adopted by the man himself. One who gives himself is self-given. A child accepted, while yet in the womb, is one received with a bride. He who is taken for adoption, having been forsaken by his parents, is a deserted son."

1815.

Raja Shum-
shere Mull,
v. Ranee
Dilraj
Konwur-

"Among these, the next in order is heir, and presents funeral oblations on failure of the preceding."

It appearing, from the above exposition of the Hindoo law, and on reference to the *vyavasthas* delivered by the pundits in the case of Raja Hemunchul Singh *versus* Ranee Bhudorun, (*vide* page 59,) which involved the same point of law, that the adoption on which the appellant rested his claim was illegal and invalid; the Court of Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) affirmed the decrees passed against the appellant, and dismissed his appeal with eventual costs, if he should be found to possess assets for the payment of them.

MUSSUMMAUT SUTPUTTEE, Appellant,

1816.

versus

INDRANUND JHA, (brother of OMANUND JHA, deceased),
Respondent.

April 2d.

THIS claim was preferred on the 28th of May 1806, by Omanund Jha, *in formâ pauperis*, to gain possession of 404 beegas, 5 biswas of *lakhuraj* land situated in pergunna Dhurumpoor. The estate, including the mesne profits, was valued at 7,517 rupees. The defendant was widow of the late proprietor (Nundanundun Jha) and had recovered possession of the property in dispute under a summary decree passed in conformity with regulation 49, 1793. The claim of the plaintiff was founded on his being the adopted (*kritrima*) son of the deceased husband of the defendant. The defendant admitted the fact of the adoption, but maintained that it had been made solely for the due performance of funeral obsequies, and not for the purpose of conferring any right of inheritance; the estate having been conferred upon her by her husband previously to his death. The following questions were put by the Zillah Judge to his Hindoo law officer: If the plaintiff had not been adopted son, to whose lot would it have fallen to offer up oblations to the deceased? Admitting that Nundanundun Jha left an adopted son (*kritrima* or *kurta pootra*) who would be his heir? Can a person appoint a *kritrima* son on his death-bed, or is there any particular time and form requisite for the ceremony? If at the time of the adoption the son be not present (which in this instance appeared to be the case) but afterwards

In the form of adoption termed *kritrima* (a form peculiar to the province of Mithila) the express consent of the person nominated for the adoption must be obtained during the life-time of the adoptive father: the offer to adopt, as being the act of one parties

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only, and as being merely a proposal to enter into a contract, held insufficient to give validity to the transaction.

perform the funeral obsequies of the deceased, will he be considered in law as being regularly appointed a *kritrima* son? The reply of the pundit was to the following effect: Had the deceased not appointed a *kritrima* son, it would have belonged to his widow to perform his funeral obsequies, but if he did appoint one, the person so appointed would be his heir. If a person on his death-bed nominate a *kritrima* son, who accepts the appointment, he is established as such, and if at the time of the nomination the son so adopted be not present, but afterwards perform the funeral obsequies, he will be considered in law as being regularly appointed a *kritrima* son.

The fact of the nomination (in virtue of which the plaintiff acted as adopted son to the deceased) having been proved, and the Zillah Judge relying on the accuracy of the above law opinion, gave judgment for the plaintiff with costs, and this decree was affirmed on appeal by the Provincial Court. A further appeal was preferred to the Sudder Dewanny Adawlut by Mussummaut Sutputtee, and Omanund Jha (the original plaintiff), having died about this time, was succeeded by his brother Indranund Jha.

It appeared in evidence, that Nundanundum Jha had died from the bite of a mad dog, and that at the time of his death he was in a state of distraction. The Court, however, without insisting on this particular circumstance, put to their pundits the following general question: A Mithila Brahmin being on the point of death, owing to the bite of a mad dog, makes a verbal nomination of an absent person to be his adopted (*kritrima*) son; according to the Mithila law is the adoption, as *kritrima* son, of the absent person nominated by a Brahmin, being in the condition above described, or being in any other condition, valid or not? Are there any particular forms of proceeding prescribed to a Mithila Brahmin who wishes to adopt a *kritrima* son, and if so, what are those forms? Does the *kritrima* son inherit the property of his adoptive father, even although the latter leave a widow?

The pundits replied in the following terms: If a Mithila Brahmin under any circumstances make a verbal nomination of an absent person to be his *kritrima* son, the adoption is not valid, because the proposal "be you my son," and the consent "I will become your son," are both requisite, and in this instance cannot be found.

Authorities, 1st, *Vivada Chintamunee*:—If a person being childless say to the son of another, "be you my son," and he answer, "I have become your son," he is a *kritrima pootra* or ninth son in order.

2nd, *Vivada Chundra*:—If a person say to another of his own tribe, "Be you my son," and the other agree thereto, and answer "I have become your son," he is a *kritrima* son.

3rd, *Baudhayana*:—He whom a man adopts, the boy being equal in class and consenting to the adoption, is a son made.

The prescribed form for adopting a *kritrima* son is as follows: In an auspicious hour let him bathe, and also cause the person whom he wishes to adopt to be bathed; let him present something at his pleasure, and say, "Be you my son," and let the son answer, "I am become your son." Then let him, according

to custom, give a suit of clothes to the son. These are the legal conditions of adoption. 1816.

Authority 1st, *Rudradhara* in the *Suddhi Viveka*: The form to be observed is this (in a *kritrima* adoption): at an auspicious time, the adopter of a son having bathed, addressing the person to be adopted, who has also bathed, and to whom he has given some acceptable chattel, says, "Be my son," he replies, "I am become thy son." The giving of some chattel to him arises merely from custom. It is not necessary to the adoption. The consent of both parties is the only requisite, and a set form of speech is not essential.

Mussum-
maut Sut-
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Jua.

The adopted (*kritrima*) son will inherit the property of his adoptive father, even although the latter leave a widow.

On an inspection of the above exposition of the Hindoo law as current in Mithila, the Fourth Judge was of opinion, that the original plaintiff had no right to the inheritance in virtue of the alleged adoption, and that the decrees of the Zillah and Provincial Courts should be reversed. The Senior Judge concurring in this opinion, they were reversed accordingly, and a final decree was passed directing restitution of the lands to the appellant, together with mesne profits, to be estimated by the Zillah Judge in the event of the parties not coming to a private agreement as to their amount. Costs in all three Courts were made payable out of the estates of the respondent and his deceased brother, should they be found to yield sufficient assets. (a)

(a) The ancient Hindoo legislators have enumerated twelve different classes of sons. For a description of these see *Colebrooke's Digest of Hindoo Law*, vol. 3, page 151. But it appears from an extract from the *Aditya Purana*, translated in *Colebrooke's Digest* (vol. 3, page 272), and from a quotation of the *Smriti* or sacred code subjoined to *Sir W. Jones's Translation of the Ordinances of Menu*, that the filiation of any but a son legally begotten or given in adoption by his parents, is a part of law abrogated in the *cali* age. The adoption of a *kritrima* son (which term has been rendered by Mr. Colebrooke and Sir W. Jones, a son made or adopted) has been generally discontinued as interdicted in the present time; but in the Mithila Province the practice still prevails, as does in Orissa the practice of appointing brothers to raise up male issue to deceased, impotent, or even absent husbands, and the offspring of such connexions is termed *kshetrnja* or son of the wife. These methods of adoption being resorted to in the Provinces above-named have been held by the pundits to be valid, and to confer on the sons so adopted the right of performing the obsequies and inheriting the estates of their adoptive fathers, chiefly on the ground of peculiar and immemorial usage, which wherever it obtains is considered to supersede the general maxims of law. The indulgence thus shown to usage is justified by the following among other texts of their legislators: *Menu*, "Let him walk in the path of good men, the path in which his parents and forefathers walked; while he moves in that path he can give no offence." *Cutyayana*: "*Bhrigu* declared, let him (the ruler) regulate the laws of inheritance according to the usage which obtains in the country, tribe, society, and village respectively." *Yagnawalkya*, "The usages, forms of law, and peculiarities of tribes, should be observed without alteration on the acquisition of territory."

It did not appear that in this case there had been any written contract of adoption between the parties. Had a plea of this nature been established, it would doubtless have given validity to the transaction, provided the offer of adoption had been accepted during the life-time of the person nominating, the performance of the ceremony of bathing, &c. being considered of minor importance.

1816.

SHAUM BEEBEE, and others, Appellants,
versus

April 4th.

SONAOOLLA, Respondent.

According to the provisions of regulation 26, 1814, a special appeal cannot be granted from a decree on the ground of its awarding to an auction purchaser possession of certain lands which lands not being specified among the auction papers and in the plaint under the designation given to them in the decree are apparently different from those claimed: but this is sufficient ground for recommending a review.

THE appellant, Shaum Beebee, was the daughter of one Moohummud Subeer, whose talook, situate in pergunna Omerabad and comprising several mouzas, was sold by public auction at the Collector's office in the Zillah of Tippera, and purchased by the respondent in the year 1213, B. S. But the appellants, and other heirs continuing to hold possession of certain parts of the estate, the respondent, Sonaoolla, instituted a suit to eject them from lands measuring, in extent, 2 *doons*, 7 *cawnies* and 13 *gundahs*, stated to be situate in mouzas Inayutpoor, Banesur and Nazirpoor, and to form a part of the talook purchased at auction. The annual produce was estimated at 148 rupees.

The defendants in reply, alleged that the talook of Moohummud Subeer was assessed at 1 rupee, 14 anas, 1 cowrie, and that out of that 8 anas were deducted on account of mouzas Puchhim-Inayutpoor, Ghoscanta, and Hajeepoor, which were *wugf*, and appropriated to the service of a mosque. The plaintiff in replication denied the plea of the defendants, and put it to them to adduce the original title deeds by which any part of Moohummud Subeer's talook had been held as *wugf* or rent-free. He further adduced evidence to prove that at the time of the formation of the decennial settlement, when *ameens* were deputed by the Collector to collect the revenues from the talookdars, rent was levied from all the mouzas contained in the said talook.

The defendants in rejoinder denied the latter assertion, and although they could produce no original title deeds, nor prove that the mouzas in question were specified in the register of rent-free lands, yet they produced documents signed by two successive Collectors (Messrs. Buller and Myers), in which notice was taken of the remission of 8 anas in the talook of Moohummud Subeer, on lands which had been appropriated to religious purposes.

The Register of the Zillah Court, before whom the cause was originally tried, on the ground of the ryots of mouzas Puchhim-Inayutpoor, Ghoscanta and Hajeepoor having paid rent to *ameens* deputed by the Collector, considered that those mouzas could not have been appropriated to religious purposes or held rent-free.

With respect to the documents signed by the Collector, and filed by the defendant, he observed, that although they did mention a remission of rent on some mouzas in the talook of Moohummud Subeer, yet they did not specify the particular mouzas. The lands claimed as *wugf* by the defendants were therefore decreed to the plaintiff.

On appeal to the Judge from the above decree, a reference was made to the Collector, from which it appeared that the mouzas so decreed were not sold by auction along with the talook of Moohummud Subeer, and did not form a part of the purchase. The decree of the Register therefore was reversed.

This decree, however, was reversed, and that of the Register

affirmed on appeal, by the Provincial Court; it appearing to the Second Judge that Shaum Beebee and the other heirs had clearly no right to hold the lands rent free; there being no title deed extant to that effect, and the register of rent free lands not specifying any of those in the talook of Moohummud Subeer as coming under that description. A petition for a special appeal was presented to the Sudder Dewanny Adawlut, which petition, among other arguments against the decision of the Provincial Court, contained the following: That the mouzas in question never paid rent, as appears from the *sunnud*, or commission, delivered to the *ameens* at the period of the decennial settlement (which document would be filed), in which they are expressly directed not to assess those mouzas. That although there is no document forthcoming to prove the fact of the lands having been made *wuqf*, yet that the fact of their being so was notorious, and that they had been appropriated to religious purposes before the acquisition of the Dewanny. That the Collector, on reference, had distinctly declared that those mouzas were not included in the auction purchase of Sonaoola. That the lands measured 192 beegas, and that hence the claim of the respondents could not be attended to according to the regulations, which provide that Government alone can sue for the recovery of such lands held rent free as may exceed in extent 100 beegas.

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la.

The Court of Sudder Dewanny Adawlut (present R. Ker) expressed an opinion that, according to the merits of the case, the decree was improper, the lands decreed appearing evidently to be *wuqf*; but the decree was obviously unjust on another account, as the mouzas Puchhim-Inayutpoor, Ghoscanta and Hajeepoor, which had been decreed to Sonaoola, had not been mentioned by that person in his plaint, and that even admitting the lands not to be *wuqf*, Sonaoola could have no right to them, as they had not formed a part of his purchase, nor had they been specified in the auction papers. The Court remarked further, that although by the provisions of section 2, regulation 26, 1814 (a), the admission of a special appeal was prevented, yet that there could not exist a doubt but that the Provincial Court would, under the abovementioned circumstances, grant a review of their judgment on petition to that effect being presented by the appellants in the mode prescribed by clause 2, section 4, regulation 26, 1814. The appellants were therefore directed to present a petition for a review, accompanied by a copy of the order of the superior Court in the case. A petition was accordingly presented, and rejected by the Provincial Court, assigning as the causes of its rejection, that further evidence had been taken which proved that the petitioners had no *wuqf* land in the talook of Moohummud Subeer; that the talook comprised ten mouzas and kismuts, of which those claimed by Sonaoola, viz. Inayutpoor, Banesur and Hajeepoor were three; and that from the statement of Sonaoola it appeared that these three mouzas were those designed by the petitioners, as Puchhim-Inayutpoor, Ghoscanta and Hajeepoor, they having altered the names with the view of defeating the right of Sonaoola; and that there was every reason to believe that the statement of Sonaoola with regard to this difference in the designations of the mouzas was just and correct.

(a) Revived by Clause 2, Section 4, Regulation 2, 1825.

1816.

RAJA CHUTTER SINGH, Appellant,

versus

April 5th.

SHAH MOOHUMMUD ALI, Respondent.

In a suit brought by one person against another to recover certain lands under a deed of gift alleged to have been executed in his favour by the proprietor, it is only necessary to enquire into the title of the claimant; and should it accidentally appear that neither party has a right to the property, still the rightful heirs must institute a regular suit in order to recover it.

THIS was an action brought by the respondent (Shah Moolhum-mud Ali) in the Zillah Court of Tirhoot on the 23d of August 1805, against Rajah Madoo Singh, father of the appellant) to recover possession of certain lands situated in pergunnas Narsutha, &c. the annual produce of which was estimated at 5,485 rupees. His claim was in substance as follows; "My maternal grandfather Shumsher Khan was killed in battle. He left a widow, Mussumaut Wasila Beebee, and two daughters, Hidayut Oonisa and Asmut Oonisa who was my mother. The whole of his property went to his widow in satisfaction of her dower. When Hidayut Oonisa married Kurum Ali Khan, Beebee Wasila gave her the property in dispute, and Hidayut Oonisa, who had no other child than Wuzeer Oonisa, my wife, gave to me the whole of the property which she had got from her mother and husband, and executed in my favour a *hubbnameh*, or deed of gift, on the 7th of May 1781. Kurum Ali Khan demised in the year 1790, and shortly after that event the defendant prevailed on the Collector to dispossess me by the production of a fabricated deed of gift alleged to have been executed in his favour by Kurum Ali. The defendant replied that Shumsheer Khan was killed by the troops of the Nuwab Mahabut Jung while in the act of waging a rebellious war, and that all his property was seized on by the Government, and that his widow never enjoyed any part of it; that Kurum Ali obtained a grant exclusively on his own account, of the said property from Jaffier Ali Khan; that he enjoyed the profits until the year 1795, when shortly before his death, he made the property over by gift to the defendant, in whose favour also he presented a petition, mentioning the transfer, to the Collector; and that had Hidayut Oonisa obtained the lands from her mother, as stated by the plaintiff, her name would doubtless have been registered as proprietor; that Wuzeer Oonisa died childless before Kurum Ali, and that the failure of heirs induced the latter to make a gift of the estate to the defendant; that the plaintiff had been in possession merely as farmer, and that he could have no legal claim to the proprietary right either under a plea of gift or by right of inheritance. The Judge, being of opinion that the plaintiff had not established his claim, dismissed the suit with costs.

The plaintiff being dissatisfied with this decree appealed from it to the Provincial Court, and the defendant deceasing shortly after the appeal was admitted, was succeeded in the cause by his son Raja Chutter Singh. In that Court two other claimants appeared, namely, the sister of Kurum Ali Khan and her daughter, who alleged that the estate was an ancestrel one; that they were co-heirs with Kurum Ali, and had consequently a right to succeed him by the law of inheritance.

The Judges of the Provincial Court were of opinion that the circumstances stated by the plaintiff and defendant in the Zillah Court were sufficient to invalidate the pleas of gift set up by each

party; that the proprietary right of the person, from whom the plaintiff alleged that he received the gift, was not established, and that consequently it could not operate to vest a right in him; that he could have no claim on the score of inheritance, inasmuch as his wife Wuzzer Oonisa died before her father, and that the claim of the defendant was not admissible, it being incredible that Kurum Ali should have made a gift of his property to a Hindoo. 1816.

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Adverting to these circumstances, the appeal was dismissed, and the decree of the Zillah Court reversed. An order was passed directing that the estate in dispute should be put into the possession of the sister of Kurum Ali, and in her default should go to her daughter. It was at the same time provided, that nothing contained in the decree was intended to prevent any other persons from claiming as heirs. The costs in the Provincial Court were declared payable by the parties respectively.

Both parties being dissatisfied with this decree, appealed to the Sudder Dewanny Adawlut, but the appeal of Raja Chutter Singh having been first preferred, was admitted, and it was not considered necessary to the decision to admit that of Shah Moohum-mud Ali. The sister of Kurum Ali had died in the interim, and her daughter also did not appear. The brother of Kurum Ali presented a petition to the Sudder Dewanny Adawlut setting forth her death, and claiming the entire estate as being the sole surviving heir. The Fourth Judge (R. Ker) was of opinion that the decree of the Provincial Court awarding the estate to the heirs of Kurum Ali should be reversed. He considered that from the evidence adduced it was clear that the respondent had held the estate in farm, not as proprietor; and independently of the documentary evidence adduced in support of the deed brought forward by the appellant, the fact of the respondent not having sued for more than ten years after the date of it, was sufficient to establish its authenticity.

When the cause came on before the Senior Judge (J. H. Harington,) the original documents relative to the deed of gift purporting to have been executed in favour of the appellant's father were required from the Board of Revenue. It appeared that they bore date only one month previous to the death of Kurum Ali, and that they were not produced until after the death of that person. The Senior Judge was of opinion, that from these circumstances much suspicion attached to the deeds brought forward by the appellant, but adverting to the fact of the original claim of the respondent being founded on the *hubbnameh* purporting to have been executed by Hidayut Oonisa and his possession under it as proprietor, and he having failed to establish his title, the Senior Judge considered that there was no necessity for enquiring into the authenticity of the deed of gift set up by the appellant, but that should any heir of Kurum Ali Khan come forward and institute a regular suit against the appellant to recover the estate, on the plea that the deed of gift was not authentic, it would then become necessary for the party in possession to prove its authenticity. A final decree was passed accordingly, adjudging that the estate in dispute should be restored to the appellant, and that that part of the decision of the Provincial Court which

nullified the deed of gift in favour of the appellant, and decreed the property to the heirs of Kurum Ali Khan, should be reversed. The costs were made payable by the parties respectively.

1816. MUSSUMMAUT BANO O BEEBEE, (Widow of KHOONKAR NOOR
Buksh, deceased) and CHAND BEEBEE, Appellants,

May 3d.

versus

FUKHEROODEEN HOSEIN, (Minor,) through his Guardian
MOOHUMMUD TUKEE, Respondent.

A kabeennameh or deed of marriage settlement by a husband to his junior wife for a moiety of his estate, held to be of no avail in law, it appearing that he had previously settled his entire estate on his senior wife; and that the deed in question had been executed without her permission duly obtained: and a deed of gift by a person to a minor received into her family as an adopted son, for property of which possession was not delivered at the time of the gift, or during the life of the donor, who retained possession of it

THIS was an action brought *in forma pauperis*, by Khoonkar Noor Buksh, in the Zillah Court of Rajshahye on the 1st of July 1807. (but afterwards removed under the provisions of regulation 8, 1813, into the Provincial Court of Moorshedabad, against Mussummaut Chand Beebee and Fukherooddeen Hosein, to recover a 7 ana, 8 cowrie share of mouzas Puhar, &c situated in pergunna Selbaras; of which the annual produce was stated at 15,009 rupees. The plaintiff sued as heir to his deceased sister Sajidoonissa, on whom he alleged the lands in question, with the exception of a 4 ana share of *kismut* Melanchee, her ancestral property, had been settled in lieu of dower, on the occasion of her marriage in 1207, B. S. with Abou Talib Chowdhry also deceased.

Chand Beebee, the junior widow of the said Chowdhry, pleaded a right to a moiety of the estate claimed by the plaintiff under a deed of marriage settlement executed by the Chowdhry in her favor on the 29th *Srawun* 1210, B. S., and an *ikrarnameh* dated the 19th of the same month, alleged to have been executed in her favor by Sajidoonissa, the purport of which was as follows: "I, Sajidoonissa hereby give my husband Abou Talib permission to settle upon Mussummaut Chand Beebee, in lieu of dower, a moiety of the lands which he settled on me at the time of our marriage in 1207, B. S."

Fukherooddeen Hosein (through his guardian Moohummud Tukee), pleaded a right to the entire estate possessed by Sajidoonissa, alleging that Abou Talib settled his entire estate upon Sajidoonissa in lieu of dower, in 1207, B. S.; that having no children they received him into their family as an adopted son; that on the demise of the said Chowdhry in 1210, B. S., Sajidoonissa was registered as sole proprietor of the lands possessed by him; that in 1211, B. S. she made over to him the whole of her possessions by a *hubbanameh* or deed of gift; that he was in that year registered as proprietor of mouzas Bandole, &c. comprizing the portion of the estate situated in Zillah Dinagapore; that an accident occurred which prevented his name being recorded in the registry, as proprietor of the portion of the estate situated in Zillah Rajshahye, during the life-time of Sajidoonissa; that on the demise of that person, Chand Beebee, in collusion with his *mokhtar* Sheb Sunker Neokee, procured her name to be registered jointly with his as proprietor of the lands

situated in Rajshahye; and that as the *ikrarnameh* pleaded by Chand Beebee was not an authentic document, the *kabeen-nameh*, or deed of marriage settlement, granted to her by Aboo Talib, could not avail in her favor against his claims under the *hibbanameh* above-mentioned. 1816.

The plaintiff denied that the *hibbanameh* could be any bar to his claims, alleging that Fukherooddeen Hosein had never received possession under the gift; and that accordingly the gift was not complete and was invalid.

It appearing on a reference to the *kabeen-nameh* executed by Aboo Talib Chowdhry in favour of Sajidoonissa, that the said Chowdhry had thereby settled upon her the whole property possessed by him in lieu of dower: It further appearing from evidence adduced by Fukherooddeen Hosein that Sajidoonissa was in 1210, B. S., registered as sole proprietor of the lands possessed by her husband, and acknowledged as such by the Board of Revenue; that in 1211, B. S., she made over her entire estate (including her ancestrel property), to him by a *hibbanameh* or deed of gift, and caused his name to be substituted in the registry as proprietor of the lands situated in Dinagepore; and that she afterwards, until the period of her death, held possession of these lands, and of the lands situated in Rajshahye, as guardian in his behalf. the Provincial Court of Moorsshedabad considered that the possession of Sajidoonissa, as guardian on the part of Fukherooddeen Hosein during his minority, was sufficient to give legal validity to the gift; and that, accordingly, the plaintiff could not maintain any right to the lands in dispute as heir of his sister Sajidoonissa; and dismissed his suit with costs.

It being established by the evidence that Chand Beebee presented a petition to the Collector of Rajshahye on the 29th of February 1804, the prayer of which was that she should be registered as proprietor of a moiety of the lands possessed by her deceased husband in virtue of the deed of marriage settlement executed by him in her favour; that Sajidoonissa presented a petition to the Collector on the same date, praying that her name should be substituted in the registry in the room of that of Aboo Talib, as proprietor of the entire estate held by him, in virtue of her deed of marriage settlement; that the Collector then called on the widows to adduce proof of their respective claims; and that Chand neither produced nor made any mention whatever of the *ikrarnameh* filed by her in the present suit, but merely exhibited the *kabeen-nameh* executed in her favour by Aboo Talib: It being further established by the evidence, that the Collector on the 12th of March 1804, ordered that the name of Sajidoonissa should be substituted in the registry in the room of that of Aboo Talib, and referred Chand Beebee to the Civil Court for the determination of her claims; and that she did not avail herself of the assistance of the Court until after the death of Sajidoonissa, which occurred nearly three years subsequent to the date of the Collector's order; and it moreover appearing on comparison of the name of Sajidoonissa affixed to the *ikrarnameh* set up by Chand Beebee, with Sajidoonissa's ascertained signature on other documents, that it differed materially from them, the Provincial Court of Moorshe-

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dabad considered the *ikrarnameh* on which the claims of Chand Beebee rested to be inadmissible, and rejected her claim with costs. Final judgment was accordingly given in the Provincial Court in favour of Fukherooden Hosein. Chand Beebee, appellant, being dissatisfied with this decision, preferred an appeal to the Sudder Dewanny Adawlut, estimating her claim at 7,504 rupees, 8 anas, the annual produce of a moiety of the lands in dispute.

On appeal by Noor Bukhsh from the above decision to the Sudder Dewanny Adawlut, he still alleged that the seizin of the donee was necessary to render the gift complete; that the respondent had never been seized in the lands constituting the gift; of which, he alleged, that Sajidoonissa had retained possession during her life-time, and had even aliened portions by *bye-bil-wuffa*, notwithstanding that the father of Fukherooden Hosein was then alive. He further insisted that the ancestral property of Sajidoonissa included in the deed of gift consisted of a 4 ana share of *kusmut* Melanchee, a joint and undivided estate; and that a gift of such property was invalid under the Moohummudan law.

It appeared to the Sudder Dewanny Adawlut, that the claims of the parties in this case divided themselves into three distinct heads:

1st, The claim of Chand Beebee, appellant, junior widow of Abboo Talib, to a moiety of the estate possessed by her husband, under her deed of marriage settlement, and an *ikrarnameh* alleged to have been executed in her favour by Sajidoonissa.

2d, The claim of Fukherooden Hosein to the entire estate possessed by Sajidoonissa, under a deed of gift granted by that person to him.

3d, The claim of Noor Bukhsh, as heir at law, to the entire estate held by his sister Sajidoonissa.

The Court accordingly, with the view to determine the points of Moohummudan law connected with each case, referred the papers and proceedings to their law officers, and proposed the following questions for their opinion:

1st, In the event of it being established that Sajidoonissa executed the *ikrarnameh* pleaded by Chand Beebee, will the latter, under the *kabeen-nameh* granted in her favour by her late husband Abboo Talib, be entitled to a moiety of the lands in dispute, which had been previously settled on Sajidoonissa at her marriage in lieu of dower?

2d, In the event of its being established that Sajidoonissa did not grant the *ikrarnameh* set up by Chand Beebee, will the latter, under the *kabeen-nameh* in her favour, be entitled to a moiety of the lands in question, which had been previously settled upon Sajidoonissa at her marriage in lieu of dower, but of which Abboo Talib retained possession during his life time?

3d, In the event of the *hizbanameh* executed by Sajidoonissa in favour of Fukherooden Hosein being established, if it should appear that she caused him to be registered as proprietor of some of the *mehals* specified in the deed of gift, and not of the rest, which remained registered in her name and possessed by her until her death, which occurred about three years subsequent to the date of the deed of gift; and if it should also

appear that she during that period granted deeds of *huc-bu-wuffa* 1816. in her own name for portions of the said *mehals* (which was in proof): will such possession by Sajidoonissa on the part of Fukherooden Hosein, a minor, and received into her family as an adopted son, be sufficient to render the gift complete, notwithstanding that the father of the minor was alive at the time? or in consequence of his name not having been recorded in the registry as proprietor of certain *mehals* specified in the deed of gift, will the gift of these *mehals* be considered incomplete under the Moohummudan law? Mussum-maut Ba-noo Bee-bee and Chand Beebee, v. Fukherooden Hosein.

4th, If it appear that *kismut* Melanchee, wherein the ancestral property of Sajidoonissa was situate, was held as a joint undivided estate by her and the rest of the sharers at the time of the execution of the deed of gift; is the gift of such property valid or otherwise under the Moohummudan law?

5th, If Sajidoonissa died leaving a brother and a sister, to what shares of her property would they be respectively entitled?

Nujjumooden Khan, the late *Cauzee ool-coozat*, differed in opinion from *Mooftees* Serajooden Ullee Khan (present *Cauzee-ool-coozat*) and Moohummud Rashid, as to the Moohummudan law on the points specified in questions 1, and 3.

His *futwa*, which in other respects corresponded with the *futwa* of those officers, was as follows:

1st, Aboo Talib Chowdhry was not competent to make over any part of the property in question to Chand Beebee, without permission obtained to that effect from Sajidoonissa, on whom he had previously settled the whole of the said property in lieu of dower; because the said property belonged exclusively to Sajidoonissa: if however Sajidoonissa executed an *ikrarnaméh* in favour of Chand Beebee, thereby granting permission to her husband Aboo Talib to make over a moiety of the property in question to the latter, in lieu of dower, and Talib Chowdhry, with the permission of Sajidoonissa so obtained, settled a moiety of the said property on Chand Beebee; such act is legal and valid, it resembles the act of an agent duly confirmed by his constituent.

2d, If the *kabeen-naméh*, in favour of Chand Beebee were executed by Aboo Talib, without permission obtained to that effect, from Sajidoonissa, on whom he had previously settled his entire estate at her marriage in lieu of dower; Chand Beebee cannot maintain any right to a moiety of his estate under that *hibbanaméh*, even although the lands in question remained in the possession of the Chowdhry during his life-time.

3d, In the event of the gift by Sajidoonissa in favour of the minor in question (who was received into her family as an adopted son), being established, if it appear that the said minor was registered as proprietor of certain *mehals* specified in the deed of gift, and not of the rest, which were registered in the name and remained in the possession of Sajidoonissa subsequently to the date of the *hibbanaméh*; the validity of such a gift is a disputed point among the learned, some of the doctors, such as the authors of the *Hedaya*, *Kifaya*, *Buhroorraiq* and others, maintain, that if a person make a gift of a thing to a child who has been

1816. received into his family as an adopted son, and whose father is alive, the possession by such person in behalf of the infant is insufficient to give legal validity to the gift. Others again, as Birjindee and the author of the *Jama Ramooz*, contend that it is sufficient, and *futwas* upholding the validity of such a gift have been delivered. But as it appears in the present case that Sajidoonissa, subsequently to the date of the *hibbanameh*, aliened portions of the estate by deeds of *bye-bil-wuffa* granted in her own name; this circumstance affords proof of her having retracted the gift: and a gift may lawfully be retracted with the consent of both parties, or by a decree of the *Cauzee*; and the gift cannot be upheld.

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4th, If the ancestrel property of Sajidoonissa, included in the deed of gift, be a share of a joint and undivided estate, the gift thereof (in consequence of no partition having been made) is invalid.

5th, If Sajidoonissa shall have died leaving a brother and a sister, by law two-thirds of her property fall to her brother, and the remainder to her sister.

The answers delivered by the *Mooftees* to questions 1, and 3, were as follow :

1st, Aboo Talib Chowdhry was not competent to make over any part of the property in question to Chand Beebee, without permission to that effect obtained from Sajidoonissa, upon whom he had previously settled the whole of the said property in lieu of dower; because the said property belonged exclusively to Sajidoonissa.

And, admitting that Sajidoonissa executed the *ikrarnameh* pleaded by Chand Beebee, still, according to the law, a settlement made by Aboo Talib upon Chand Beebee, under the permission contained in that deed, would not be valid, unless such settlement were subsequently confirmed by Sajidoonissa; and this does not appear on the record.

3d, In the event of the deed of gift by Sajidoonissa in favour of Fukherodeen Hosein being established; if he shall have been registered as proprietor of a portion of the lands therein specified, and have received possession thereof, the gift is valid and complete with respect to that portion of the lands, provided he was endowed with reason at the time of seizin: but, with respect to the completion of the gift of that portion of the lands which was not registered in his name, and of which Sajidoonissa held possession during her lifetime, the doctors have differed in opinion. Some of them maintain that possession by the donor in behalf of an infant adopted into his family, whose father is alive and forthcoming, is insufficient to render the gift complete; but, that if the father of the infant be dead or not forthcoming, it is sufficient. Others again contend that it is sufficient; the modern doctors, such as the authors of the *Jama Ramooz*, *Birjindee*, *Doorur Mokhtar*, and *Ibrahim Shahee*, have recorded in their works extracts from the *Moozmirat*, *Futawa Qohistane*, *Mooltuqut*, and other celebrated works, wherein it is mentioned that *futwas* have been given upholding the validity of a gift, where possession has been taken in behalf of a minor by a person into whose family he may have been received as an adopted son. The doctors, on the other hand,

who dissent from this opinion, are unable to cite a single case determined in conformity with the doctrine held by them. Supposing then that the gift was established and complete, Sajidoonissa could not legally alien any portion of the lands constituting the gift by deeds of *bye-bil-wuffa*: should she have done so, the gift will not on that account be annulled. The circumstance of Sajidoonissa having aliened portions of the lands constituting the gift, can in no wise be held to be proof of the retraction of the gift, for a gift can only be retracted with the consent of both parties or by a decree of the *Cauzee*; and the proof of the retraction of a gift must be clear and positive.

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Noor Bukhsh demised at this stage of the proceedings, and his widow Banoo Beebee appeared to prosecute the appeal. In consequence of the difference of opinion between their law officers, the Court directed both of the answers above recorded to be submitted to *Moulvee* Hamidoollah (who, on the demise of Nujmooddeen Khan and the consequent promotion of Serajooddeen Ulee Khan to the office of *Cauzee-ool-coozut*, had been appointed one of the *Mooftees* of the Court), for an exposition of the law on the disputed point, and directed the present *Cauzee-ool-coozut* and *Mooftee* Moommud Rashid to reconsider their opinions. The last two officers saw no reason to depart from their former opinion.

The answer delivered by *Mooftee* Hamidoollah to question 1st exactly corresponded with that delivered by the present *Cauzee-ool-coozut*, Serajooddeen Ulee Khan and *Mooftee* Moommud Rashid. His answer to question 3d was as follows:

In the event of the deed of gift by Sajidoonissa in favour of Fukherooddeen Hosein a minor, who had been adopted into her family, being established; if the said minor were registered as proprietor of some of the lands specified in the gift during the lifetime of Sajidoonissa, and if Sajidoonissa shall have held possession of the rest of the lands subsequent to the date of the deed of gift, notwithstanding that the father of the minor was alive at the time: with respect to the validity of such a gift the doctors have differed in opinion. The majority of the doctors consider such a gift to be valid and complete: amongst these are Sudderi Shaheed, Fukher ool Islam, Qazee Khan, the author of the *Wiqaya*, Sudder oosshereeut and Sheikh ool Islam. The point has moreover been determined agreeably to this doctrine, as will appear on a reference to the *Futawa-i Cauzee Khan*, *Futawa-i Aulumgeeree*, *Jama Ramooz*, and other books of law. Amongst the doctors, who maintain that such a gift is invalid, are the authors of the *Izah*, *Tujreed* and *Hedaya*: but as the majority and the most celebrated of the doctors have determined the point in favour of the validity of the gift, their opinion is to be adopted in preference to the opinion of the others. The circumstances of Sajidoonissa having subsequently to the date of the deed of gift aliened portions of the land constituting the gift by deeds of *bye-bil-wuffa* in her own name, cannot be held as proof of the retraction of the deed; for a deed can only be retracted with the consent of both parties or by the decree of the *cauzee*, whereof proof is wanting.

The Court of Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), on consideration of the evidence of the

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evidence of the case and the answers of their law officers, observed that they entirely concurred in opinion with the Provincial Court of Moorshedabad, that the *ikrarnameh* pleaded by Chand Beehee was not an authentic document, and that therefore Chand Beehee could not, under the Moohummudan law, maintain any claim to a moiety of the estate in dispute, in virtue of the *kabeen-nameh* executed in her favour by Abou Talib.

They further observed, that as the authenticity of the *ikrarnameh* in question was not established, it was unnecessary to come to any decision upon the point of law stated in question 1st, respecting which their law officers had differed in opinion.

Under these circumstances, the Court of Sudder Dewanny Adawlut confirmed that part of the decree of the Provincial Court of Moorshedabad which provided for the rejection of the claims of Chand Beehee, and dismissed the appeal with costs.

With respect to the claim of Fukherodeen Hosein, in virtue of the *hibbanameh* executed by Sajidoonissa in his favour, the Court of Sudder Dewanny Adawlut recorded their opinion as follows :

" It appears to be clearly established by the evidence adduced, that Sajidoonissa received the respondent (a minor) into her family as an adopted son, during the life time of her husband Abou Talib; that on the demise of her husband in 1210, B. S., she became sole proprietor of his estates in virtue of her deed of marriage settlement; that on the 13th *Jeyte* 1211, B. S., she granted a *hibbanameh* or deed of gift in favour of the said minor for the entire estate possessed by her; that he was registered as proprietor of a portion of the lands specified in the deed of gift situated in Zillah Dinagepore, in the month of *Assin* of the same year; and that he was never seized in the remaining portion of the lands specified in the said instrument, situated in Zillah Rajshahye, whereof Sajidoonissa retained possession during her lifetime, and aliened portions by *bye-bil-wuffa*, in her own name. On consideration of the answers delivered by the law officers to the questions proposed to them by the Court, it is clear that the gift of the lands situate in Zillah Dinagepore is valid and complete, as the seizin of the donee has been established; but, it appears that the validity of the gift with respect to the lands situated in Zillah Rajshahye, in which the donee was not seized during the lifetime of the donor, is a disputed point among the learned: as, however, the majority of the doctors, (in whose opinion the present *Cauzee-ool-Couzat* and two *Mooftees* of the Court coincide), maintain, that the possession held by Sajidoonissa, in behalf of the said minor, who had been adopted as a son into her family, was sufficient to give legal validity to the gift, notwithstanding that the father of the child was alive at the time; and that the alienation by Sajidoonissa of portions of the estate, during the time she held possession thereof on the part of the said minor, cannot annul the gift, or be considered as proof of the retraction of the gift; the Court consider it just and equitable that the decision in this case should be guided by the opinion of the majority of the doctors; and accordingly that Fukherodeen Hosein should be put in possession of the portion of the lands specified in the deed of gift, situated in Rajshahye. It further appears to be established by the

evidence adduced, that the ancestral property of Sajidoonissa consisted of a 4 ana share of mouza Melanchee, a joint and undivided estate, of which a partition was never made. but, as the law officers of this Court have declared the gift of such property to be invalid, the respondent cannot maintain any right under the *hubbanameh* above mentioned to the said property, of which under the *futwa*, two-thirds will fall to Noor Bukhsh, the brother, and the remainder to Khoorsheid Beebee, the sister of Sajidoonissa."

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At this stage of the proceedings, the *vakeels* of Fukherodeen Hosein, on being questioned, stated that their constituent had been in possession of the 4 ana share of the ancestral property in question ever since the date of the death of Sajidoonissa, and at the same time alleged that he could not, under the Moohummudan law, be compelled to surrender accounts to the heirs of Sajidoonissa of the mesne profits derived from the said share, as the authenticity of the deed of gift executed by Sajidoonissa in his favour was established; as it was obviously the intention of the donor that all her property, both ancestral and acquired, should be included in the gift; and as the donor had omitted to take the necessary steps to render the gift of the said property complete, solely in consequence of her ignorance of the provisions of the Moohummudan law.

Under these circumstances, and also with reference to the evidence of the case, they expressed a hope that the law officers should be called upon for an exposition of the law on the following points:

1st, Whether under the circumstances stated by them, the heirs of Sajidoonissa could compel Fukherodeen Hosein to render them accounts of the mesne profits accruing from the 4 ana share of the ancestral lands in question, or otherwise?

2nd, It appearing from the evidence adduced by both parties, that an allotment of the ryots cultivating mouza Chinta (one of the mouzas comprized in the abovementioned *kismut*) was made to the several sharers in the proportion of their respective shares; will the gift of a 4 ana share of this mouza be valid, notwithstanding that no actual partition of the lands among the several sharers ever took place?

The Court of Sudder Dewanny Adawlut judged proper to refer these questions to their law officers, who delivered the following answers:

1st, According to the doctrine held by Aboo Huneefa, it is not incumbent on Fukherodeen Hosein to render accounts to the heirs of Sajidoonissa of the mesne profits accruing from the 4 ana share of the *kismut* in question; such pecuniary profits, as in the case of an invalid sale, not being considered in law as the natural production of the lands, or as forming a constituent part thereof. The two disciples however maintain a contrary opinion: but the point has been ruled conformably with the doctrine of Aboo Huneefa.

2nd, Under the circumstances stated in the question proposed by the Court, the gift of a 4 ana share of mouza Chinta will not be legal and valid, in consequence of no actual partition of the lands having ever been made: if, however, the allotment of the

1815. ryots among the several sharers was made on a reference to the *chitta* and *jumabundee* papers, which are prepared on an actual survey and measurement; such allotment would amount to a partition of the lands, and on seizin being duly taken, the gift would be complete.

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The Court of Sudder Dewanny Adawlut observed, that the gift of the 4 ana share of mouza Chinta was invalid, as the evidence merely proved that the ryots cultivating mouza Chinta had been allotted to the several sharers in the proportion of their shares, and not that an actual measurement and partition of the said mouza had ever been made. They further observed, that under the exposition of the Moohummudan law furnished by their law officers, it was not necessary for Fukherooden Hosein to account to the heirs of Sajidoonissa for the amount of mesne profits received by him from the 4 ana share of *kismut* Melanchee.

Under these circumstances, and for the reasons which guided their opinion above recorded, the Court of Sudder Dewanny Adawlut passed a final decree, which provided that so much of the decree of the Provincial Court of Moorshedabad as adjudged possession to Fukherooden Hosein of the lands which had been settled on Sajidoonissa in lieu of dower, and of which she had enjoyed sole and exclusive possession, should be confirmed, but that so much of the said decree as provided for his being put into possession of the 4 ana share of a joint and undivided ancestral estate should be reversed; that the said 4 ana share should be distributed amongst the heirs of Sajidoonissa as the law directs, and that Fukherooden should not be held responsible to the heirs of Sajidoonissa for the payment of the amount of mesne profits accruing therefrom.

The order usual in the case of pauper suitors was passed with regard to costs.

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COLLECTOR OF BAREILLY, Appellant,

versus

May 31st.

WILLIAM, CHARLES, and JOHN MARTINDELL,

Respondents.

The tenure by *jageer* is neither alienable nor hereditary; and it is considered as a life grant merely, as far as respects the exemption from public assessment.

THIS was an action brought by the respondents in the Provincial Court of Bareilly on the 9th of March 1814. They sued to recover possession of four mouzas situated in pergunna Bareilly and to hold them free of assessment.

The decennial produce of the lands was estimated at 35,000 rupees. It was set forth in the plaint, that in the year 1756, Hafiz Ruhmut Khan (who was at that time ruler of the Province of Rohilkund, conferred the property in question on a person named Moohummud Ashruf Khan, to hold as a transferable and hereditary tenure; and that the grant was confirmed by the Nuwaub Vizier in 1776, while the province of Rohilkund was under his government; that on the 22d of April 1807, William and Charles Martindell purchased, in the name of the former, from Moohummud Ashruf, three of the mouzas, namely, Mehta Bundhowlee and Dundea, and that on the 9th of July of the same year, John

'Martindell, the other brother, purchased the remaining mouza (Deegha) from Mushurruf Ali Khan and Moohummud Ghose Khan, sons of the grantee, who had made a gift of it to them; that they had since held the mouzas in partnership until the 17th of August 1813, when the Collector issued orders for their resumption, assessed the revenue, and made the settlement with a farmer named Jyegopaul, on the grounds that the original grantee had died, and that the words *jageer* and *inaam* being used in the *sunnuds* and reports of the *canoongoes*, the grant was resumable at the death of the grantee, under the provisions of section 16, regulation 36, 1803. In conclusion, the plaintiff set forth that the word *inaam* was synonymous with *altumgha*, which is universally used to express an hereditary tenure, and that the application of the term *jageer* could not of itself alter the nature of the grant-so as to make it a life tenure.

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The defendant demurred to the plaint, on the plea of its combining in one suit two grounds of action, the vouchers in which cases were distinct and of different dates; but (as stated in reply by the plaintiffs) all the lands having been resumed by one order of the Collector, the plaintiffs were fully competent to include the whole in one suit. This plea being therefore over-ruled, the defendant alleged that it clearly appeared from the *goomnameh* or certificate of the loss of former *sunnuds* delivered into the Collector's office by Moohummud Ashruf Khan himself, and filed by the plaintiffs, that the lands were of that description termed *jageer*, which are never hereditary; that this fact was also established from the reports of the *canoongoes* and other evidence; that consequently the lands were resumable by Government on the death of the grantee, and moreover, that they were granted to Moohummud Ashruf Khan on account of services to be performed, and when he was not acting in the capacity of deputy to the *aumil* were farmed out by Government to other persons.

The following were among the documents filed by the plaintiffs: 1st, A *sunnud* bearing the seal of Hafiz Ruhmt Khan, dated the 10th. *Rubeoosance* (date of year illegible) running thus: To the present and future *Mutusuddies* of *pergunna* Bareilly, *sircar* Budoon in the *soohah* of Shahjehanabad, mouza Mehta and others have been exempted from assessment, and established as a *jageer* to the exalted nobleman Moohummud Ashruf Khan, from the commencement of the year 1163, F. S. (or 1756 A. D.): it is desired that no opposition be made to the enjoyment of the property by the person alluded to. After his death his family shall succeed him.

2nd, *Sunnud* bearing the seal of Asophoodowla Behauder, dated the 21st of *Mohurrum* 1190, A. H. (or 29th of March, 1776, A. D.) confirming Moohummud Ashruf, but making no mention of hereditary right, and terming the tenure *inaam*.

3d, *Sunnud* from the *aumil* of the district to the same effect, dated two years afterwards.

4th, *Sunnud* from the Resident, A. Balfour, three years afterwards.

5th, A bill of sale from Moohummud Ashruf Khan to W. Martindell, dated 15th of *Suffur* 1222, A. H. (or 22d of April 1807,)

1816. selling to him mouzas Mehta and Bundhowlee for the sum of 7,800 rupees, with a receipt for the amount.
- Collector of Bareilly, v. William, Charles, and John Martindell. 6th, Ditto from ditto to ditto, same date, selling mouza Dundea for 2,200 rupees with a receipt for the amount.
- 7th, Ditto from Mushuruf Ali Khan and Moohummud Ghose Khan (sons of Moohummud Ashruf), dated the 2d of *Jumadee-ul-luwul* 1222, A. H. (or 9th of July 1807) selling mouza Deegha for 5,500 rupees.

The defendant filed the following documents:

1st, A *goomnameh*, or certificate of a loss, bearing the seal of *Cazee* Gholam Nubee, dated in 1195, A. H. or 1781, A. D., and attested by numerous witnesses, reciting that Moohummud Ashruf Khan had come before him and stated that after the fall of the Rohilla Government, he had been plundered of all his property, and among other things, that his two *jageer sunnuds*, granted by Hafiz Ruhmut Khan and the Nawaub Vizier had been carried off; and that consequently he (the *cazee*) had questioned the *chowdhries* and *canoongoes* on the subject, and that they had confirmed the above statement.

2nd, *Arzee* of Dulsingh Rai, agent of Mr. W. Martindell, addressed to the Collector, and dated the 10th of July 1812, praying that his constituent's name might be registered as proprietor in lieu of that of Moohummud Ashruf Khan, and offering to produce his vouchers.

3d, Proceeding of the Collector, dated the 29th of July 1813, reciting the deposition made before him by Nusrut Khan, son of Moohummud Ashruf Khan, in which he distinctly declares that his father held the lands in question free of assessment only during the period in which he was employed as deputy to the *aumil* of the province.

4th, Extracts from the *dehsunee* or decennial reports deposited in the Nizamut records, wherein all the mouzas in question are specified as the *jageer* of Moohummud Ashruf Khan.

5th, Report of the record keepers of the Collector's office on the *arzee* of Dulsingh Rai, setting forth that according to section 16, regulation 36, 1803, all *jageers* are considered as life tenures only, and consequently resumable on the death of the grantee.

6th, Report of the *canoongoes*, showing that during the administration of the Nuwaub Vizier, while Moohummud Ashruf was employed in the capacity of deputy to the *aumil*, the lands in question were held by him exempt from assessment as *maam* and *nancar*, and that when not so employed, the collections were made from them by Government; also, that the lands were in the possession of Moohummud Ashruf ever since the Company assumed the Government.

Several witnesses were called on the part of the plaintiffs, to prove the fact of the alleged grant having been made by Hafiz Ruhmut Khan to Moohummud Ashruf, and his continued possession under it, and their evidence tended generally to the support of these facts. One witness, who was present when the sale was made to the plaintiff, W. Martindell, deposed that he (Martindell) refused to purchase the mouzas unless the original *sunnuds* were

produced; that Moohummud Ashruf, in reply, assured him that the *sunnuds* had been missing, but had since been discovered to be in the possession of his sons, with whom he was at variance, and that previous to their disagreement he had made over to them the mouza Deegha, by purchasing which, from them, the plaintiff would doubtless obtain the original title deeds; that the purchase of this mouza having been subsequently effected, the title deeds were made over to the plaintiffs accordingly.

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The defendant adduced no witnesses, but denied the authenticity of the *sunnud* alleged to have been granted by Hafiz Ruhmut Khan, observing that it appeared as well from the *sunnud* itself as from the *goomnameh*, that the tenure conferred was a *jageer*, and that these tenures not being hereditary, the provision for making the lands descend to the family of the grantees furnished a strong argument against the authenticity of the document in question.

An investigation was commenced by the Provincial Judge, with a view of discovering whether the seal affixed to the grant was really that of Hafiz Ruhmut, but it appearing from the result that this person was in the habit of using seals of various descriptions, nothing conclusive or satisfactory could be established.

On the 30th of July 1814, the Senior Judge passed a decree in favour of the plaintiffs on the following grounds: It appeared from the vouchers and evidence that Moohummud Ashruf Khan had been nearly sixty years in possession of the lands in question as *jageer* granted by Hafiz Ruhmut Khan, the sovereign of Rohilkund; that he and his sons sold the same to the plaintiffs; that the lands had been held exempt from assessment during three successive governments: that in the *sunnud* bearing the seal of Hafiz Ruhmut Khan it is expressly stated, that after the death of Moohummud Ashruf his family shall succeed him; that the grantees were at full liberty to sell their interests, and that the purchaser paid a valuable and sufficient consideration. The Collector was accordingly directed to restore the plaintiffs to possession, and to pay all mesne profits together with costs of suit.

An appeal having been preferred to the Sudder Dewanny Adawlut, and no further pleas having been adduced on either side, the above decree was reversed, and the Court (present J. H. Harington and J. Fombelle) recorded their opinion on the case in the following terms: "It appears that the lands in question formed the *jageer* of Moohummud Ashruf, since dead. This fact is admitted by the respondents. It is obvious that lands composing a *jageer* remain exempt from assessment only during the lifetime of the *jageerdar*. After his death the *jageer* is resumed, and the lands revert to the *zemindar* or other *malik*, and being assessed according to usage and the regulations, the proprietor pays the revenue to Government. This is strictly in conformity with ancient usage, and the resumption by Government of such tenures is expressly declared in sections 5, and 15, regulation 25, 1803. It is therefore inconsistent with reason to suppose that Hafiz Ruhmut Khan in granting a *sunnud* for a *jageer*, or life tenure, annexed to it a condition that it should be hereditary. Besides, the *sunnud* is suspicious on many other accounts, 1st, there is no specification

1816. of the mouzas in the body of the grant, or at the foot of it, and it does not bear the signature of any public officer; 2dly, the impression of the seal is different from that generally used; 3dly, in the *goomnameh* obtained by Ashraf Khan himself, there is no mention of hereditary right; 4thly, that *sunnud* was never transmitted to the Collector, although the respondents admit that they received it at the time of their purchase in 1807; 5thly, had the *sunnud* been in existence, the respondents would undoubtedly have presented it to the Collector when they petitioned in 1813 that their names might be registered. Such a document cannot now be received in evidence, nor can any of the other pleas be admitted to establish the hereditary exemption from assessment of the lands in question, which as being a *jageer*, or life-tenure, must escheat to Government, on the death of the grantee."

Collector of Bareilly, v. William Charles, and John Marquandell.

The lands were therefore declared liable to resumption, and the costs of suit were made payable by the respondents; who were at the same time informed that they were at liberty to prefer to the Collector any claim which they might have on the score of proprietary right.

1816.

July 16th.

BISHONATH MITTER, and SUMBHOOCHURN MITTER
(Heirs of BUGHEERUT MITTER, deceased), and CHUNDEE
CHURN, Appellants,

versus

COMMERCIAL RESIDENT OF COMERCOLLY,
Respondent.

A enters into an engagement with B, acknowledging himself to be in arrear for advances to the amount of 7,746 rupees, and engaging to furnish silk to that value, and to clear off the arrear within a given time, or on failure thereof to pay ready money

THIS was an action brought by the Commercial Resident at Comercolly, in the Civil Court of Zillah Jessore, on the 5th of August 1809, to recover from Bugheerut Mitter and Chundee Churn the sum of 2,227 rupees, 10 anas, 3 gundas, for breach of engagement.

It appeared that Bugheerut, one of the defendants, had been for several years employed in the provision of raw silk for the residency; that on the plaintiff's adjusting accounts with him on the 24th *Bysakh*, 1214, B. S., there was an arrear to the amount of 7,746 rupees, 13 anas, 8 pies against him, for former advances; and that he accordingly on the same date entered into an *ikrar-nameh* or written engagement with the plaintiff, on the security of the other defendant, to the following purport: "I, Bugheerut, acknowledge myself in arrear for advances to the amount of 7,746 rupees, 13 anas, 8 pies; I engage to furnish silk to the above value, and to clear off the arrear on or before the end of the present month; if I do not clear it off, I will pay ready money with interest agreeably to regulation 31, 1793." It was set forth in the plaint, that the defendant, in violation of the terms of his engagement had only delivered silk to the amount of 1,384 rupees, 18 gundas; that, after deducting that sum from 7,746 rupees, 13

anas, 8 pies, there remained a balance of 6,364 rupees, 10 anas, 10 pies, for the recovery of which a suit had already been instituted in the Dewanny Court; and that the present action was brought for the recovery of 2,227 rupees, 10 anas, 3 gundas, due as penalty under the engagement, from Bugheerut and his security Chundee Churn. 1816.

The defendant Bugheerut pleaded the irrelevancy of the rules contained in regulation 31, 1793, to his case, and stated that the sum constituting the amount of the engagement was the balance of advances made to him from time to time by the former Resident, with whom he had not entered into any engagement whatever; that the engagement was taken by compulsion from him by the plaintiff; and that accordingly the claim of the plaintiff to penalty under the provisions of regulation 31, 1793, and upon the said engagement, was inadmissible. He further stated, that he had furnished silk to the value of 1,382 rupees, 18 gundas, under the said engagement; and that his surety, the other defendant, had tendered payment of the balance of money remaining due, viz. the sum of 6,364 rupees, 10 anas, 10 pies, with interest at the rate of 12 per cent, but that the plaintiff had declined acceptance of the same. These facts were admitted. with interest, agreeably to regulation 31, 1793. An action being brought by B, for the recovery of the penalty specified in clause 7, section 3, of the abovementioned regulation, the Court of Sudder Dewanny Adawlut held that he was only entitled to recover interest at the rate of 12 per cent on the balance of the arrear, on the ground of the irrelevancy of the clause and section above specified to the case of A.

The answer of Chundee Churn agreed in substance with the above.

Bugheerut demised at this stage of the proceedings, and his sons appeared to defend the suit. The Zillah Judge was of opinion, that as the Commercial Resident was authorised by the regulations to compel the defendant Bugheerut to enter into the above engagement with him, the plea of compulsion set up by him was inadmissible; and that as the execution of the said engagement by Bugheerut on the security of Chundee Churn was fully proved, as was also the failure of the deliveries under it; the rules contained in clause 7, section 3, regulation 31, 1793, were strictly applicable to the case: judgment was accordingly given in the Zillah Court in favour of the plaintiff, for the sum demanded with costs against the defendants. On appeal by the defendants from the above decree to the Provincial Court of Calcutta, that Court concurred in it, and it was consequently affirmed.

A special appeal from the above judgment was admitted by the Sudder Dewanny Adawlut, with a view to determine the relevancy or otherwise of clause 7, section 3, regulation 31, 1793, to this case; and on perusal of the proceedings held upon the case, as the engagement on which the action was brought did not contain any specification of the clause and section abovementioned, or of the penalty, or of the quantity of silk to be delivered, or of the rate of penalty demandable on any given quantity of silk remaining undelivered; but merely stipulated for the delivery of silk to the value of 7,746 rupees, 13 anas, 8 pies, or on failure thereof, for the payment of the balance in ready money with interest agreeably to regulation 31, 1793; and also as the engagement in question was entered into by Bugheerut, for an arrear against him on account of former advances, and not for advances made to him at the period of its execution, the Court (present R. Ker and W. E. Rees), were of opinion that the provisions of the said clause and section were wholly irrelevant to the present case; that accordingly the payment

1816. of the penalty therein specified could not be demanded from the appellants; and that the respondent under the said engagement was only entitled to interest at the rate of 12 *per cent* on the balance of the sum constituting the amount thereof.
- Bishonath Mitter and others, v. Commercial Resident of Comercolly. The decrees of the Zillah and Provincial Courts were accordingly reversed, and a final judgment passed for the respondent's recovering from the appellants, instead of the penalty, interest at the rate of 12 *per cent* on the balance of the sum of which the amount of the engagement consisted. The costs in each of the Courts were made payable by the respondent.
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1816. RAMMOHUN SIRCAR, Appellant,
versus
 Aug. 19th. JUGMOHUN SIRCAR, Respondent.

THE respondent in this suit made an application to the Commissioner on the 14th of December, 1809, for the execution of a decree passed in his favour by the Dutch authorities on the 22d of November, 1803, against Rampershaud Sircar, Ramsoondur Sircar, and the appellant, for a 4 ana share of property moveable and immoveable, acquired by trade while the defendants were in partnership with his late father, and an *aumeen* was on that date appointed with the defendants to make a partition of the property in question.

The Commissioner, on the 20th of April 1812, after inspection of the reports and accounts submitted by the *aumeen*, ordered that the respondent should be put into possession of a 4 ana share of the landed property as divided off by the *aumeen*, and should receive from the defendants the sum of 9,074 rupees, 6 anas, 14 gundas, with interest at the rate of 12 *per cent*, that sum appearing to be the balance due to him after deducting different sums, which he admitted from time to time to have received from the defendants. Rampershaud Sircar and Ramsoondur Sircar being dissatisfied with the adjustment of accounts adopted by the Commissioner, preferred an appeal from the above order to the Court of Sudder Dewanny Adawlut. Rammohun Sircar, the other defendant, did not become a party with them in the appeal, but presented a petition to the Commissioner, setting forth that his father died when he was a minor; that the other defendants (his uncles) with whom he resided had taken possession of all his father's wealth on his behalf; that he had defended the suit merely in order to ingratiate himself with his uncles, and to obtain their good will; that the claim of Jugmohun could in no wise attach to him, as neither he nor his father had ever been in partnership with the father of Jugmohun; and praying that his uncles should be held responsible for the whole sum awarded to Jugmohun. The Commissioner declared the plea recited in his petition to be inadmissible; and ordered that he should forthwith pay the pro-

portion of the amount due by him to Jugmohun under the aforesaid decree. 1816.

Rammohun preferred an appeal to the Sudder Dewanny Adawlut, on the grounds stated in the above petition: It appearing that the appellant had jointly with the other defendants defended the suit; and that no mention had been made by him in any former stage of the cause, of the circumstances which his petition recited, the Court (present R. Ker and G. Oswald), were of opinion that the plea adduced by him was wholly inadmissible, and accordingly dismissed the appeal with costs. admissible, no mention having been made at any former stage of the proceedings, of the circumstance which it recited.

RANEE KISHENMUNNEE, (Widow of GOURHURREE BHOSE, deceased), Appellant, 1816.

versus

Aug. 29th.

MR. BATTYE, (late Collector of Dacca Jelalpore,) Respondent.

THIS was an action brought by the respondent in the Zillah Court of Dacca Jelalpore, on the 16th of May 1807, against Rug- goonath Chuckerwurttee, Gourhurree Bhoose, Nundcoomar and Chundunnerayon Sein, for the recovery of the sum of 2,639 rupees, alleged to have been embezzled by Rug- goonath Chuckerwurttee, while he held the situation of stamp *mohurrir*. It was set forth in the plaint, that Rug- goonath Chuckerwurttee had been appointed to the situation of stamp *mohurrir* on the security of the other defendants; and that the present action was brought for the recovery of the above stated sum embezzled by him from the proceeds of the sale of stamp paper while he held the situation in question. The defendant Rug- goonath appeared, but did not plead to the suit. In an action brought to recover from the sureties of a stamp mohurrir a sum of money alleged to have been embezzled by him from the proceeds of the sale of stamp paper, the plea urged by one of the defendants, of fresh sureties having been obtained subsequent to his undertaking, on account of his security being considered insufficient, does not entitle him to exemption from his original

The defendant, Gourhurree Bhoose, admitted that he had become security for the defendant Rug- goonath, at the time of his being appointed to the office of stamp *mohurrir* by the Collector, Mr. Massie, and that his security bond had never been actually cancelled; but pleaded, that as his security was rejected as insufficient by the Collector who had succeeded to Mr. Massie, and as Nundcoomar and Chundunnerayon Sein had become securities in his stead, he had then obtained a virtual discharge from all future obligation and responsibility.

The defendant, Nundcoomar, admitted to have become security for Rug- goonath at the period specified by Gourhurree Bhoose: but alleged that his security having been rejected as insufficient by the plaintiff, on his appointment to the collectorship, Rug- goonath tendered the security of Chundunnerayon, which was approved of; and that consequently Chundunnerayon having become solely and exclusively responsible for Rug- goonath, he had been virtually discharged from his undertaking. The defendant Chundunnerayon did not appear.

Gourhurree Bhoose demised at this state of the proceedings, and his widow (the appellant) appeared to defend the suit.

1816.
obligation,
the security
bond
never
having
been cancelled.

The Zillah Judge observed, that fresh security had probably been demanded from Ruggoonath in consequence of Gourhurree's constant absence from the district, which was in proof, and was of opinion, on the grounds of its being stated in the security bond executed by Chundunnerayon, that he had jointly with Nundcoomar become security for Ruggoonath, and of there being no allusion made to Gourhurree Bhoose in the security bond executed by Nundcoomar, that Gourhurree Bhoose had been discharged from all responsibility; and that the sum claimed (Ruggoonath not having questioned the demand) was justly due by Ruggoonath and his sureties Nundcoomar and Chundunnerayon Sein. Judgment was accordingly given in the Zillah Court in the plaintiff's favour for the recovery of the amount claimed, with costs from the estate of Ruggoonath, or his sureties Nundcoomar and Chundunnerayon.

After an appeal had been preferred from that decision by Nundcoomar, to the Provincial Court of Dacca, he died, and his son Sheochunder appeared to prosecute the appeal.

As Gourhurree Bhoose was the original surety of Ruggoonath, and as it did not appear on inspection of the security bond executed by Nundcoomar that Gourhurree had been thereby discharged from his obligation, the Provincial Court were of opinion that Gourhurree was jointly with the other sureties responsible for the payment of the sum claimed. A judgment was therefore passed amending the decree of the Zillah Court, and directing that the sum claimed, with interest to the same amount, should be recovered from Ruggoonath, or from the heirs of Gourhurree and the rest of the sureties. The costs of suit in the Zillah Court were made chargeable to Ruggoonath and his sureties, and those in the Provincial Court to the appellant. Mussumaut Kishenmunnee being dissatisfied with this decision, presented a petition to the Sudder Dewanny Adawlut for the admission of a special appeal, which was complied with.

The Court of Sudder Dewanny Adawlut (present R. Ker and G. Oswald) confirmed the judgment given by the Provincial Court on the following considerations:

1st, The security bond executed by the husband of appellant, by which he rendered himself responsible for Ruggoonath so long as that person should remain in the office of stamp *mokurrir*, or until he should obtain a full discharge from the Collector, had never been cancelled, and it did not appear that Ruggoonath had ever obtained a discharge from any Collector, or that Gourhurree had ever delivered him up with a view to his being discharged from his undertaking.

2d, It was not established at what period the embezzlement took place, nor that Ruggoonath had been discharged from the office of *mokurrir* previous to the further security of Nundcoomar and Chundunnerayon being demanded, as the appellant before this Court attempted to prove.

The appeal was dismissed accordingly with costs against the appellant.

KISHENMOHUN BUNHOOJEA, ROOP NERAYON GHOSE 1816.
and PETUMBER GHOSE, Appellants,
versus Oct. 17th.
RAMINDUR DEB RAI (Brother of RAJINDUR DEB RAI,
deceased), Respondent.

THIS was an action brought by the late Rajindur Deb Rai, *in A claim to formd pauperis*, in the Zillah Court of Jessore, on the 28th of April 1806, to recover from the appellant 1,712 beegas, 8 biswas, of *birt* lands, situated in mouzas Chandpore, &c. pergunna Mahmoodshahee. *on the plea that as there was*

The plaintiff stated that a 3 ana, 4 gundah share of pergunna Mahmoodshahee, which comprized the zemindaree of his late father, Raja Govind Deb Rai, was in 1207, B. S., sold under an order of the Supreme Court, and was purchased by the defendants, who, under that sale, had taken possession of the *birt* lands in dispute, which were appointed to the service of an idol and denominated *Deo Shewa*, although there was no specification of these lands in the bill of sale; and that as the sale of lands appropriated to the support of any religious institution was prohibited by the regulations, the sale of the lands claimed was illegal. *no specification thereof in the bill of sale, it was not included in the assets of an estate sold by order of the Supreme Court, dismissed by*

The defendant, Petumber Ghose, pleaded that on the 3 ana, 4 gunda share of pergunna Mahmoodshahee, the property of the late Raja Govind Deb Rai, being advertised for sale at auction by the sheriff of the Supreme Court in 1207, B. S., he became purchaser thereof, with the exception of a single *mehal* named Dhaneek Kamar, which was purchased by the defendant Kishenmohun; that he afterwards sold the lands purchased by him to the said Kishenmohun; and that as the whole right, title and interest of the late Raja in the above specified share had been conveyed to them by the bill of sale, the plaintiff could not have any title to the *birt* lands claimed by him. The defendant, Petumber Ghose, further stated, that Kishenmohun, since his occupancy of the abovementioned 3 ana, 4 gunda share, had punctually discharged the sum paid by the former zemindars for the support of the idol. *the bill of sale plainly stating that all the lands both khiraj and lakhiraj included in the said estate, together with all the right, title and interest of the proprietor therein, were there-by conveyed to the purchasers.*

The answers filed by the other defendants were to the same effect. As the bill of sale (dated the 31st of July 1800,) plainly stated that all the lands, both *khiraj* and *lakiraj*, included in the 3 ana, 4 gunda share of pergunna Mahmoodshahee, together with all the right, title and interest of Raja Govind Deb Rai therein, were thereby conveyed to the defendants, the auction purchasers; and as it was admitted by the plaintiff that the defendant Kishenmohun had since his occupancy punctually discharged the sum paid by the former zemindars for the support of the idol, the claim of the plaintiff appeared to the Zillah Judge to be inadmissible, and was accordingly dismissed with costs.

On appeal by Rajindur Deb Rai from that decision to the Provincial Court of Calcutta, that Court did not concur in it. Doubts were entertained by the Provincial Court whether or not the *birt* lands claimed were included in the lots sold, as there was no specification of them in the bill of sale, and at all events it

1816. was considered, that as the sale of such lands was prohibited by the regulations, the sale of the lands in dispute was illegal, and could not be upheld.

Kishen-
mohun
Bunhoojea
and others,
v. Ramin-
durDeb Rai. The Provincial Court therefore reversed the decree of the Zillah Judge, observing that Rajindur was entitled to possession of the lands claimed. Reimbursement of costs was at the same time ordered to be made to the claimant.

After an appeal had been preferred by Kishenmohun Bunhoojea and the other defendants, from the above decision to the Sudder Dewanny Adawlut, Rajindur demised, and his brother Ramindur Deb Rai attended and pleaded as respondent in the cause. The Court of Sudder Dewanny Adawlut, (present R. Ker and G. Oswald), were of opinion, as the bill of sale on which the appellants rested their claim plainly stated that all the lands both *khiraj* and *lakhiraj* included in the 3 ana, 4 gunda share of pergunna Mahmoodshahee, together with all the right, title and interest of Raja Govind Rai therein, were thereby conveyed to the appellants, that they were under that instrument entitled to the *birt* lands in dispute, as well as to the rest of the estate.

The decree of the Provincial Court was accordingly reversed, and judgment given in favour of the appellants. The order usual in the case of pauper suitors was passed with respect to costs.

1816.

MUSSUMMAUT RAHUT OONISSA, (pauper), Appellant,
versus

Nov. 15th.

THE HEIRS OF MIRZA HIZUBR BEG, (deceased),
Respondents.

In a suit by a wife against her husband, both of the *Sheea* sect of *Moo-hummu-dans*, for the amount of her dower, it appearing that the sum of 500 rupees was verbally specified at the reading of the ceremony in the *Sheea* form, but that a deed

THIS action was brought by Mussummaut Rahut Oonissa, *in formâ pauperis*, against her husband Mirza Hizubr Beg, in the City Court of Patna, on the 19th of July 1799, to recover the sum of 11,001 rupees, in part of 100,001 rupees, alleged to have been settled on her by the defendant at the time of their marriage, as specified in a deed of settlement produced by the plaintiff, bearing date the 29th of *Rubbeeoossannee* 1207. H. S.

The defendant, in his answer, denied the validity of the plaintiff's claim, and pleaded that he and the plaintiff were of the *Sheea* persuasion; that the sum of 500 rupees, *moowujjul*, or payable at a future period, was verbally specified at the reading of the marriage ceremony in the *Sheea* form; that the deed of settlement for the sum of 100,001 rupees, was executed merely in compliance with the customs of the place and from respect to the *Sheea* tenets; and was not intended to be of any effect; that, moreover, the plaintiff had by her disobedience and improper behaviour towards him forfeited every claim to dower, and that he was also legally exempted from the charge of her maintenance.

It appearing from the evidence adduced that the parties were both of the *Sheea* sect; and that the marriage ceremony was read

in the *Sheea* form, with a verbal declaration of the dower at 500 rupees, the City Judge considered a former decision of the City Court in the case of Omdut Oonissa v. Mirza Asud Ali, (which was affirmed on appeal to the Provincial Court of Patna), as a precedent, and in conformity therewith passed a decree in favour of the plaintiff to the amount of 500 rupees only. 1816.
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After an appeal had been preferred by the plaintiff from the above decree to the Provincial Court of Patna, the defendant died, and the cause was left depending between the plaintiff and the heirs of the defendant. the hus-
band for
100,001
rupees,
adjudged

The Judges of that Court, after duly considering the proceedings held in the cause, affirmed the judgment of the City Judge and dismissed the appeal. The plaintiff preferred a further appeal to the Sudder Dewanny Adawlut. After an attentive perusal of the proceedings held in the cause, and a reference to the decree passed by them in the case of Omdut Oonissa Begum, pauper, v. Mirza Asud Ali, (*vide* vol. 1, p. 276), it appeared to the Court (present R. Ker and G. Oswald), that first the reading of the ceremony in the *Sheea* form took place, when the sum of 500 rupees was verbally declared to be the amount of dower; that a deed of settlement for the sum of 100,001 rupees was subsequently executed by the husband, and that agreeably to the doctrines of the *Sheea* and the *Soonee* sects, it is optional with the parties contracting the marriage to fix the amount of dower either before or after the reading of the marriage ceremony. The Court therefore declared the amount of dower specified in the deed of settlement to be legally due to the appellant from the respondents, and reversed the decrees of the City and Provincial Courts. A final judgment was passed for the appellant's recovering from the estate of her husband the sum of 11,001 rupees, being that part of the amount specified in the deed of settlement, for the recovery of which the present suit was instituted. The costs in each of the Courts were made payable by the parties respectively. that the
sum speci-
fied in the
deed was
the sum
legally de-
mandable.

1816. PUDDUMCHURN MOHAPATER, (pauper), RASBEHARY,
JEYGOVIND and JUGGUNNATH BIDIADHUR,

Nov. 19th.

Appellants,

versus

RAMLALL PANDEY, RAMCOOMAR RAI, and
CHAITONCHURN MITTER, Respondents.

In an action brought for possession of an estate mortgaged under a deed of *bye-bil-wuffa* or conditional sale, the period for its redemption having expired, a decree was obtained in the Zillah Court. Two years after (the estate having in the mean time been sold by public auction) an appeal being preferred to the Provincial Court, the Zilla decree, from its not being in conformity to the rules of regulation 17, 1806, was reversed. The Sudder Dewanny Adawlut however held the sale to have become absolute, considering

THIS was an action brought by Ramlall Pandey, in the Zillah Court of Cuttack, on the 5th of December 1808, to recover from the appellants the talook Juggunnath Pershaud, situated in pergunna Peanuk, of which the annual produce was estimated at 9,609 rupees.

It was set forth in the plaint, that the talook claimed was mortgaged by the defendants to the plaintiff on the 9th of April 1808, for the sum of 5,651 rupees, on a deed of *bye-bil-wuffa* redeemable within six months and five days; that on the expiration of the stipulated period, without the mortgage being redeemed, he made application to the Collector of the district to have his name substituted in the registry in lieu of that of Puddumchurn; the recorded proprietor of the estate; that the defendants Rasbehary, Jeygovind and Juggunnath presented a petition to the Collector about the same time, wherein they admitted the justness of his (plaintiff's) claim, and prayed that the transfer might be made; that the transfer was stayed in consequence of objections urged against it by Puddumchurn the other defendant, and that as the estate had not been redeemed by the mortgagors within the stipulated period, the sale had become absolute, and he was entitled to possession. The defendants Rasbehary, Jeygovind, and Juggunnath, admitted the claim of the plaintiff to be just and proper, and stated that they and the other defendants had mortgaged the estate in question to him on a deed of *bye-bil-wuffa* for the sum and under the conditions specified in the plaint; that no tender of payment was made by them within the time limited; and that consequently the estate had become his property under the conditions of the mortgage. They further stated, that they had previously made a similar admission before the Collector.

Puddumchurn, the other defendant, not having delivered in his answer until ten days after the expiration of the period limited in the summons, which was duly served on him, the Zillah Judge did not think proper to receive it, and on consideration of the testimony of witnesses who deposed to the execution of the deed of *bye-bil-wuffa* by all the defendants, and of the admission of Rasbehary, Jeygovind, and Juggunnath, it appearing to him to be clearly established, that the estate in dispute had been mortgaged by all the defendants to the plaintiff on a deed of *bye bil-wuffa* for the sum and under the conditions specified in the plaint, and that the estate had not been redeemed by the mortgagors within the stipulated time, he deemed the sale to have become absolute to the mortgagee, and ordered that he should be put into possession of the estate. The costs were made chargeable to Puddumchurn. After a lapse of two years and two months from the date of the above decision, Puddumchurn presented a petition to the

Provincial Court of Calcutta for the admission of an appeal from 1816.
 it, principally on the grounds of his answer not having been received by the Zillah Judge under the circumstances abovementioned; and that Court thought proper to admit the appeal. The appellant admitted the general statement; but pleaded that the non-payment of the amount within the stipulated period did not proceed from any omission on the part of the mortgagors, but from evasion on the part of the mortgagee in order to render the sale conclusive; that he was an eight ana sharer of the estate in dispute, and that he was still entitled to redemption of that share.

the omission by the mortgagor to prefer an appeal in due time and to stay the intermediate sale of the estate as a sufficient bar to his right of redemption.

The Provincial Court were of opinion, that as the rules prescribed in section 8, regulation 17, 1806, had not been observed, the Zillah Judge was incompetent to entertain the suit; that under the provisions of the said section the mortgage was not finally foreclosed; and that the appellant was therefore entitled to the redemption of a moiety of the estate: but previous to final judgment being given, it having been brought to the notice of the Court by the parties, that during the time which had elapsed between the date of the execution of the Zillah decree and of the institution of the appeal, the estate had been twice sold, first by private sale to Ramcoomar Rai, and subsequently (at an inferior price) by public auction to Chaitonchurn for the realization of arrears of public revenue, they judged it expedient to direct, that the appellant, instead of being put into possession of a moiety of the estate, should receive from the respondent Ramlall Pandey a moiety of the purchase money which the latter received on account of the lands from Ramcoomar Rai, and interest thereon at the rate of 12 per cent, together with a moiety of the mesne profits of the estate during the period it was in the possession of the respondent, and interest thereon at the same rate; and that the appellant should pay to respondent a moiety of the sum advanced by him on the mortgage with interest at 12 per cent. The decree of the Zillah Court being reversed, judgment was passed in favour of the appellant accordingly. The costs in both Courts were made payable by the parties respectively.

Puddumchurn Mohapater preferred an appeal from the above decision to the Court of Sudder Dewanny Adawlut, and after the cause had been pending for a year before that Court, Rasbehary and the other mortgagors became parties with him in the appeal. Ramcoomar Rai and Chaitonchurn were at the instance of Puddumchurn summoned to attend and plead as respondents in the cause. The Court of Sudder Dewanny Adawlut (present R. Ker and G. Oswald) did not concur in the decision passed by the Provincial Court. The Court observed, that under the provisions of section 8, regulation 17, 1806, the Zillah Judge was not competent to entertain the suit instituted by Ramlall Pandey, and that the decree passed by him in the cause was consequently null and void. After further observing that Ramlall Pandey had nevertheless been put into possession of the estate in dispute under the said decree; and that during the period of 2 years and 2 months which elapsed between the date of the execution of the Zillah decree and the institution of the appeal in the Provincial Court, the estate was twice sold, first by private sale, and afterwards at

1816. public auction, the Court proceeded to record their opinion on the case as follows: "Puddumchurn took no measures agreeably to the spirit of the regulation to redeem his estate: he did not prefer an appeal from the Zillah decree within the period limited for the admission of appeals, and he did not, when the estate was advertised for sale by the Collector, deposit the amount of the balance due in order to stay the sale. The rest of the appellants both before the Collector and the Zillah Judge, admitted that the transaction was perfectly fair and just, as far as Ramlall Pandey was concerned, and that the sale had become absolute in consequence of their inability to redeem the mortgage: they did not join Puddumchurn in his appeal to the Provincial Court, nor did they become parties in the appeal to this Court until the cause had been pending for the period of a year, whereby they would appear to have acted in collusion with Puddumchurn. Taking into consideration therefore the fraud and negligence apparent on the part of Puddumchurn and the admission by the other appellants that the transaction was fair and just, together with the circumstance of the sale having in fact been absolute for eight years, the Court are of opinion that the appellants are excluded from all right to a redemption of their estate, and that the sale must be upheld." A final judgment was therefore passed dismissing the appeal, and annulling the decisions of the Courts below: that of the Zillah Court, on the grounds of the Judge's incompetency, under section 8, regulation 17, 1806, to try the suit, and of its being consequently null and void: and that of the Provincial Court, on the grounds of the sale, for the reasons above specified, having been held to be absolute. The order usual in the case of pauper suitors was given with respect to costs.

1816. BHOWANNYCHURN BUNHOOJEA, Appellant,
versus
 Dec. 27th THE HEIRS OF RAMKAUNT BUNHOOJEA, Respondents.

A *Hissanameh* or deed of partition, made by a Hindoo father in which he allots to his sons, portions of his estate, moveable and immoveable, ancestral and ac-

THE appellant in this case brought an action in the Zillah Court of the Twenty-four Pergunnas on the 3d of June 1807, against his father Ramkaunt, his brothers Gvaram and Anundehund, and against Mussummaut Taramonee and Mussummaut Parbuttee, wives of his brother Lukhinarain. A short time before the institution of the suit Ramkaunt had executed a *hissanameh* or deed of partition, allotting shares of his estate moveable and immoveable, ancestral and acquired, among his sons, for the avowed purpose of preventing disputes among them afterwards.

After deducting a small portion of the estate for his own support and for charitable purposes, the remainder of the property was stated and allotted as follows:

In ready money 41,000 rupees, (which sum was alleged to have been entrusted to the care of his eldest son the plaintiff).

	Rs.
To his eldest son Bhowannychurn,.....	30,000
To Gvaram,.....	3,834
To Anundchund,.....	3,733
To the Wives of Lukhnarain,.....	3,433
Total Rs.	41,000

1816.
quired, but which disposition was not carried into effect during his lifetime, is not binding on his sons after his death. If by the deed an unequal distribution be made of ancestral immovable property, such disposition is illegal and invalid, as is also the unequal distribution of property acquired by the father, and of moveable ancestral property, if made under the influence of a motive, which is held in law to deprive a person of the power to make a distribution.

In lands yielding revenue to Government, consisting in all of seventy-six mouzas.

To Bhowannychurn six mouzas and a half; the annual assessment on which portion was 2,418 rupees, 6 anas, 4 gundas.

To Gyaram twenty-three mouzas, and a 2 ana, 6 gunda, fractional share; annual assessment 3,337 rupees, 6 anas, 3 gundas.

To Anundchund twenty-three mouzas, and a 2 ana, 12 gunda fractional share; annual assessment 3,336 rupees, 14 anas, 18 gundas.

To the Wives of Lukhnarain the same proportion; annual assessment 3,336 rupees, 14 anas, 17 gundas, 2 cowries.

In lands exempt from assessment:

To Bhowannychurn, 226 beegas.

To Gyaram, 248 ditto.

To Anundchund, 247 ditto.

To the Wives of Lukhnarain, 248 ditto.

In farmed lands:

To Bhowannychurn, 599 beegas.

To Gyaram, 575 ditto.

To Anundchund, 570 ditto.

To the wives of Lukhnarain 506 ditto.

The deed of partition was duly registered; but on an attempt being made to carry it into effect this suit was instituted.

It was set forth in the plaint, that Radhakishen, the plaintiff's grandfather, left two sons, Ramram Bunhojra and Ramkaunt Bunhojra, father of the plaintiff; that these two persons lived together on the patrimonial property, and that the former, being active and having a turn for business, acquired considerable property by means of his own exertions, whereas the latter was unqualified for any occupation, and did not assist in making any acquisition; that the plaintiff traded under the direction of his uncle Ramram, by means of whose assistance he acquired large sums of money, which he appropriated to the purchase of property on his own account exclusively; that on the decease of his uncle without issue, the plaintiff's brothers being then minors, his estate was brought into the joint concern by Ramkaunt, and that the joint estate was afterwards very much improved by the expenditure of money belonging exclusively to the plaintiff or by his exclusive exertions. The following were among the objections urged by him against the validity of the deed of partition: that it was written without his knowledge; that his father was more than eighty years of age when he executed it, and not in full possession of his senses; that during the lifetime of his brother Lukhnarain the wives of that person could not be legally included in the deed, as they had no right to a share; that the deed included his exclusive property; that the joint landed property had been much increased by his

1816. exertions, notwithstanding which fact no part of that property had been assigned to him; that the sum of 40,000 rupees was falsely and unjustly stated to be in his possession; and that the deed contained no specification of the mercantile concerns or of the patrimonial estate.

Bhowanny-
churn
Bunhoojea,
v. Ram-
kaunt
Bunhoojea.

The plaintiff concluded by praying that the deed might be set aside; and that property of the value and description following should be adjudged to him; landed property yielding revenue, and free of assessment, as being his own exclusive property, valued at 9,768 rupees, 13 anas, 4 gundas; buildings on joint land, but erected at his exclusive cost, valued at rupees 1,000, and one third of the joint ancestral property, as having been improved by his own exclusive exertions, valued at 9,899 rupees, 5 anas, 4 gundas, 3 cowries. He further claimed to be exonerated from the false charge of rupees 40,000, said to have been entrusted to his possession; making the sum total of his claim to amount to 61,663 rupees, 2 anas, 8 gundas, 3 cowries.

The defendant, Ramkaunt, pleaded in answer that he had a right to make such partition among his sons as he considered proper, of his estate real and personal; that the allegations of the plaintiff with respect to his having separate property, and his having employed his exclusive funds, or his exclusive industry, in the acquisition of the joint property, were wholly false; that the plaintiff had been entrusted with the management of the landed property, but that the other sons had been also employed for the benefit of the family in different departments; that with respect to Lukhnarain, he had been excluded on account of his extravagance and bad conduct, and his share assigned to his wives, in order that he might not be left wholly destitute; that the claim of 41,000 rupees was just, as that sum belonged to the family in general, and had been entrusted to the plaintiff's possession; that all the ancestral estate (which was very small) had been included in the deed of partition; and lastly, that he, Ramkaunt, would hereafter make such disposition of the mercantile concerns as he should judge proper. The other defendants pleaded the general issue. The Zillah Judge was of opinion that as the plaintiff was not a party to the deed of partition, that instrument was invalid and illegal; as it was incumbent on the defendant Ramkaunt to have obtained the consent of all his sons previously to making a partition among them of joint ancestral property. A decree was therefore passed for setting aside the deed of partition as void and of no effect. Possession, as usual, of what he then held and had personally acquired, was awarded to the plaintiff; the joint property to be legally distributed after the death of Ramkaunt, who was declared to be at liberty to sue the plaintiff for 41,000 rupees, should he consider himself as having a claim for that sum. Costs were made payable by the defendants.

On appeal to the Provincial Court of Calcutta, the above decree was considered as erroneous in every respect. The title of the plaintiff to the immoveable property claimed by him, on the ground of its being his own exclusive acquisition, was considered as not being proved; and his claim to a third of the ancestral property was held to be inadmissible, because during a father's

lifetime a son cannot sue for a division of such property ; and his claim to be exonerated from the charge of 41,000 rupees was also held to be improper, as no demand had been made against him for that sum, and if ever made, it would then be time for him to reply to it. 1816.

The decree of the Zillah Judge therefore for setting aside the deed of partition, and awarding that Bhowannychurn should retain all the property he had acquired and was then in possession of, was reversed, there being no proof of his having made any personal acquisitions. Ramkaunt, the father, however, having demised pending the appeal, his heirs were declared to be at liberty to sue, if dissatisfied, in a Court of justice, when the division of the property of the deceased would entirely depend on an exposition of the Hindoo law. Costs were adjudged to be paid by the respondent. This decision was appealed from to the Sudder Dewanny Adawlut.

Bhowannychurn, while the appeal was pending in the Provincial Court, presented a petition to that Court, praying that the property of Ramkaunt might be attached, in order that, after the death of that person, he might be able to secure his legal share of it. This petition was complied with, and an order was issued accordingly for the attachment; but Ramkaunt petitioned the superior Court to prevent the execution of this order, on the grounds that the deed of partition executed by him had not been carried into effect, that he still retained exclusive possession of his property, and that so long as he lived no one was competent to prefer a claim to any part of it, moveable or immoveable, ancestral or acquired. These objections appeared to the superior Court to be founded on law, and the Provincial Court was directed to withdraw the order of attachment.

Under these circumstances, the provisions of the deed not having been carried into effect, Mr. Fombelle, the Second Judge of the Sudder Dewanny Adawlut, before whom the cause was first heard, was of opinion that the merits of the case could be ascertained only by a reference to the Hindoo law officers. The deed of partition was therefore referred to them, and replies were required to the following questions :

1st, Is such a deed valid according to Hindoo law, whether the property specified therein was the ancestral or acquired property of Ramkaunt, the person executing the same ?

2nd, In the event of possession not having been given of the property specified in the deed of partition, to the parties therein mentioned by Ramkaunt, and of his dying without altering or revoking the same, or making any other disposition of the property specified in it, is such deed binding on the parties therein mentioned and their heirs after the death of Ramkaunt ?

3d, Was Ramkaunt authorized by the Hindoo law, in the disposition of the property in question, to exclude one of his sons from all participation therein, and grant shares to the two wives of the said son ?

To the above interrogatories the pundits delivered the following answers :

1st, The Hindoo law prescribes two rules for the distribution

1816. by a father, among his sons, of ancestral property. The first is, to divide it into twenty parts, and having made a deduction of one twentieth for the eldest, equal shares of the residue are to be allotted to all his sons. The second is, to make an equal distribution among all his sons, without deducting any specific share for the eldest. As the father cannot legally make an unequal distribution of ancestral property among his sons, according to his will, the deed of partition, as far as it goes to make such unequal distribution, is not valid, and is not binding on the parties therein mentioned. With respect to acquired property, the law permits a father to make an unequal distribution of his own acquisitions among his sons; if he be desirous of giving more to one son as a token of esteem on account of his good qualities, or for his support on account of a numerous family, or through compassion by reason of his incapacity, the father so doing acts lawfully; therefore the deed of partition, as far as relates to the acquired property, is binding on the parties mentioned in it and their heirs, unless the deed awarding an unequal distribution was made through perturbation of mind, occasioned by disease or the like, or through irritation against any one of his sons; in which case the said deed of partition is absolutely illegal and invalid.

2nd. In the event of possession not having been given of the property specified in the deed of partition, to the parties therein mentioned by Ramkaunt, and of his dying without altering or revoking the same, or making any other disposition of the property specified in it, such deed is not binding on the parties therein mentioned, and their heirs after the death of Ramkaunt.

3d. By the Hindoo law Ramkaunt was not authorized to grant shares of his property to the wives of a living son, excluding that son from all participation, unless there should be a valid reason for that measure.

After inspecting the above opinions, the Second Judge observed, that the answer delivered by the pundits to the second question was conclusive as to the merits of the case, all parties having admitted that the deed of partition executed by Ramkaunt had not been carried into effect during his lifetime, and that he had not made any other disposition of his property, and the law officers having distinctly declared the deed under such circumstances to be nugatory and of no avail. The Second Judge therefore recorded his opinion that so much of the decree of the Provincial Court, as reversed that part of the Zillah Court's decree which left the plaintiff in possession of the property then alleged to be held by him in his own right (although disputed by the defendants, and not investigated by the Judge), should be affirmed, but that the part of it which virtually maintains the validity of the deed of partition should be reversed, and that such part of the decree of the Zillah Court as rejects the said deed as inadmissible should be affirmed: but the final decision in this case was left for the sitting of another Judge. On the 20th of September 1815, the cause was brought before the Senior Judge; and two other questions were put to the pundits, partly with a view to define, as accurately as possible, the grounds of decision in the present case; and partly to ascertain the provisions of the Hindoo law in other analogous cases.

1st, Supposing the deed of partition, executed by Ramkaunt, to be a legal and valid instrument, would it be rendered nugatory and of no avail from the circumstance of the distribution specified in it not having been carried into effect during the lifetime of Ramkaunt, although the opposition shewn by the plaintiff prevented its being carried into effect? 1816.

2nd, If Ramkaunt in his lifetime had put all the parties, excepting the plaintiff, into possession of the shares allotted to them in the deed respectively, and had divested himself of all proprietary right, would such distribution of the property, moveable and immoveable, whether acquired or ancestral, be valid (notwithstanding the declared illegality of an unequal distribution of ancestral immoveable property), arguing from its analogy to the case of a gift, against which there exists a legal prohibition; but the validity of the donation is nevertheless maintained by the author of the *Dayabhaga*? Bhowanny-churru
Bunhoojea,
v. Ram-
kaunt
Bunhoojea.

The pundits differed from each other on these points. The answer delivered by Chutoorbhoj pundit, was to the following effect:

1st, Supposing the deed of partition to be a legal and valid instrument, still a title deed, in virtue of which possession has not been taken, cannot be received in law as evidence of right, and there is no provision in the law to make such deed available, even though possession had not been obtained solely by reason of the opposition shewn by an adverse party. The law declares, further that this possession must have been in sight of the adverse party, without let or molestation on his part, and that possession for three successive generations even is not sufficient, unless it has been maintained in sight of the adverse party and with his acquiescence. Now, if by reason of the opposition created by the plaintiff, (who in this case has stood forward as the adverse party), the defendants did not, during the lifetime of Ramkaunt, obtain possession of the property specified in the deed above alluded to, it cannot be deemed valid or binding on the parties, for the reason before assigned; viz. that a title deed unaccompanied by possession must be disallowed as evidence of right.

Authorities cited in support of the above opinion: 1st, *Vyuvuhara Matrika*:—*Vyasa* has in general terms defined occupancy in all cases to consist in the being possessed in sight of an adverse party, and without molestation on his part. To support a claim resulting from occupancy there are five things requisite: that it should be accompanied by a title, and that the occupancy should be long, unobstructed, unimpeached, and in sight of an adverse party.

2nd, *Vyuvuhara Matrika*:—*Vishnoo* and *Catyayuna* have declared that property which has been possessed by three successive generations in the mode required by law, the fourth in descent will have a right to, even though unable to produce a title. "In the mode required by law," that is, without any opposition on the part of another present and able to make such opposition.

3d, *Vyuvuhara Matrika*:—That property which has been long possessed by three successive generations, even in the absence of a title, cannot be resumed, since it has regularly descended from

1816. one generation to another. "Long possessed" is meant to include uninterruptedly possessed.

Bhowanny- 4th, *Pitamuha Sunhita*:—Occupancy alone is not sufficient to
churn constitute right without a title, nor will the production of a title
Bunhoojea, suffice unsupported by occupancy. It is therefore determined that
v Ram- the existence of both is essential to constitute a right.
kaunt
Bunhoojea.

5th, *Vrihaspati Sunhita*:—The right to land does not accrue from mere occupancy, nor by the production of a title alone. From the union of both results a right, not otherwise.

6th, *Vyuvuhara Matrika*:—The original holder of a title must, if sued, prove its validity; not so his son, or his son's son, for with respect to them, occupancy will have the greater weight (in other words the *onus* of disproving their title will rest with the adverse party.)

Let it not be alleged that the fact of actual occupancy having been held to suffice for the fourth in descent, it is therefore inconsistent to assert that occupancy with respect to the son and son's son will have the greater weight, because by "greater weight" it must be understood merely that occupancy with respect to them is the principal evidence, but that a title must also be adduced in support thereof. Hence, although the title must be exhibited by them they need not prove its validity, as it is incumbent on the original holder of it, who will rest his claim chiefly on his title, and adduce the fact of his occupancy in support of the same.

7th, *Nareda*:—For the first, gift is evidence (of right); for the second, occupancy with a title; for the third, occupancy of long and uninterrupted continuance. "For the first," that is, he who originally obtained the title; "gift," that is the title as gift, purchase, &c.; "evidence" meaning the principal evidence accompanied at the same time by possession.

8th, *Nareda*:—The right to property (especially immoveable) is not conclusively established, even though the title deed be forthcoming, and the attesting witnesses thereunto are alive.

9th, *Yajnyawalkya*:—Where there has not been possession even for a short time, a title is of little avail. But where occupancy exists in one part, it may be said to exist with regard to the whole.

10th, *Yajnyawalkya*:—Where a village, a field and a garden are specified in the same grant, if possession be held of any one of them it will be considered to exist with respect to the whole.

11th, *Vrihaspati*:—Immoveable property acquired by partition, by purchase, by descent, or from the king, is confirmed by occupancy, and lost by neglect.

The answer delivered by Chutoorbhooj to the second question was to the following effect:

Supposing the deed of partition executed by Ramkaunt to have been acceded to during his life time by all the parceners (excepting the plaintiff) whose names were therein specified; that they obtained actual possession of their respective allotments, with the exception, however, of the particular share of immoveable property in the possession of the plaintiff, and that Ramkaunt divested himself of all proprietary right in the estate, yet the said deed specifies two descriptions of property, viz. ancestral, immoveable

property and acquired property real and personal: now because 1816.
no mention occurs in the *Dayabhaga* or other law tracts of the
legality of an unequal distribution of ancestral immoveable pro- Bhowanny-
perty, beyond the authorized deductions of a twentieth, half a churn
twentieth, &c; because a father has not unlimited discretion with Bunhoosjea,
respect to ancestral immoveable property, and because where the v. Ram-
Dayabhaga upholds the validity of a prohibited gift or sale, it kaant
is always understood as a proviso, that the donor be vested with Bunhoosjea.
power to make such transfer, an unequal distribution (over and
above the authorized deductions before alluded to) of ancestral
immoveable property cannot be maintained as valid. If the father
make an unequal distribution among his sons of his own acqui-
sitions, his motive must be looked into. If he were actuated by the
desire of giving more to one son as a token of esteem on account
of his good qualities, or for his support on account of a numerous
family, or through compassion by reason of his incapacity, or
through favour by reason of his piety, such distribution is valid
and must be upheld. But if such distribution were made by
the father through perturbation of mind occasioned by disease
or the like, or through irritation against any one of his sons, or
through partiality for the child of a favourite wife, it cannot be
upheld; and the reason is, because it is not only not conformable to
law, but because it does not fall under the provision of the *Daya-
bhaga* making a gift valid even though prohibited, as that provi-
sion presupposes a power in the donor; and as a father, under the
circumstances abovementioned, has been declared to have no power
in the distribution of the estate. The law looks upon a father
making an unequal distribution as having been influenced by one
or other of the motives above enumerated, and in the absence of
any apparent legal motive, it must be presumed that he was influ-
enced by a motive under the impulse of which the law considers
his acts invalid.

Authorities: 1st, *Dryabhaga*:—*Yajnyawalkya* has declared,
“The ownership of father and son is the same in land which was
acquired by his father, or in a corrody, or in chattels.” The
meaning of the above is as set forth by *Dharieswara*: “A father
giving allotments at his pleasure has equal ownership with his sons
in the paternal grandfather's estate. He is not privileged to make
an unequal distribution of it at his choice, as he is in regard to his
own wealth.”

2d, *Vishnool*:—When a father separates his sons from himself,
his will regulates the division of his own acquired wealth; but
in the estate inherited from the grandfather, the ownership of
father and son is equal.

3d, *Daya Crama Sangraha*:—A father has not the power to
make an unequal distribution of ancestral property, consisting
either of land, or a corrody, or slaves, even though any of the
causes beforementioned, namely, the superior qualifications of one
particular son, &c. should exist, and the text of *Yajnyawalkya*
which declares, “The ownership of father and son is the same in
land which was acquired by his father, or in a corrody, or in
chattels,” is intended to restrain the exercise of the father's will,
for it is impossible that, according to the literal meaning of the

1816. text (prescribing equal ownership between father and son) sons should have ownership therein so long as the father, the owner of the ancestral property, continues to survive.

Bhowanny-churn 4th, *Dayabhaga*:—Among his sons a father may make the distribution, either by giving to the first born or withholding from him the deduction of a twentieth part of the grandfather's estate.

Bunhoojea, v. Rain-kaunt But if he make an unequal distribution of his own acquired wealth, being desirous of giving more to one as a token of esteem, or for his support on account of a numerous family, or through compassion by reason of his incapacity, or through favour by reason of piety, the father so doing acts lawfully.

5th, *Dayabhaga*:—But the following text of *Nareda*, “A father who is afflicted with disease, or influenced by wrath, whose mind is engrossed by a beloved object, or who acts otherwise than the law permits, has no power in the distribution of his estate,” relates to a case where the father through perturbation of mind by disease or the like, or through irritation against any one of his sons, or through partiality for the child of a favourite wife, makes a distribution not conformable to law.

The answer delivered by Sobha Shastree, the other pundit, to the first question, was as follows: It is assumed that the deed of partition executed by Ramkaunt in favour of the defendants, is a legal and valid instrument: but it is at the same time stated, that during his lifetime those in whose favour it had been executed, did not obtain possession of their respective allotments. This circumstance was occasioned, it appears, from Ramkaunt's inability to give possession in consequence of the opposition shewn by the plaintiff. The deed of partition, however, sufficiently demonstrates the relinquishment of right on the part of Ramkaunt, and extinction of property with regard to the estate in question, the title to which became consequently vested in those in whose favour the deed of partition was executed. And as the want of possession by those persons did not proceed from neglect (by which a voluntary relinquishment is presumed and extinction of right occasioned) their title remains unimpeached, nor can any interval of time, under such circumstances, annul their privilege of taking possession of their respective allotments. The deed of partition must therefore be upheld as valid and binding on the parties.

Authorities: 1st, *Munoo*:—“Gift is a cause of ownership,” cited in the *Soodhee Tutwa*.

2nd, *Daya Tutwa*:—Property once extinct by neglect, does not again revive at will.

3d, *Vrihaspati*:—What has been acquired by partition, by purchase, by descent, or obtained as a present from the king, becomes confirmed by occupancy, but lost by neglect. This text making loss the result of neglect, virtually declares that, where there is not neglect, the title will retain its validity.

4th, *Daya Tutwa*:—Where possession exists of what has been obtained by purchase, partition, &c. there the title acquires complete validity, but it is forfeited in case of wilful abandonment.

5th, *Vyavahara Matrika*:—Possession held by a stranger of property of the owner for ten years (if it be of a personal nature), or for twenty (if it be real), whether such property have been

acquired by purchase, acceptance, or other mode of acquisition, occasions the extinction of the property of the original owner, provided no cause existed for his non-interference; such as his being a minor, or an idiot, &c. &c. 1816.

6th, *Vrihaspati*:—The omission to interfere by the owner, even though possession has been held by the adverse party for three successive generations in his presence, will not avail against him, provided there exist some good cause for his non-interference; nor will possession held for the same length of time by a person standing within the degree of relationship (to the owner) termed "*Sapinda*" or "*Saculya*" avail against the owner. *Bhowanny-churn Bunhoojea, v. Ramkaunt Bunhoojea.*

7th, *Vyuvuhara Matrika*:—"The right to property (especially immoveable) is not conclusively established, even though the title deed be forthcoming, and the subscribing witnesses thereunto are alive." This text of *Nareda* refers to the case of two litigant parties producing their title deeds, where nothing appears to lead to a knowledge as to the precise periods of time at which those deeds were executed respectively; in which case the title deed of the party in possession must be received as authentic, in preference to that of the other.

8th, *Vyuvuhara Tutwa*:—Where, however, it is ascertained which document was first, and which last executed, then the last act must be held to prevail in all contested cases, with the exception of pledges, gift and sale, where the prior act prevails.

The answer delivered by Soobha Shastree to the second question was to the following effect:

The deed of partition under the circumstances specified in the interrogatory is invalid, and not binding on the parties mentioned in it, as far as it goes to make an unequal distribution of the ancestrel immoveable property, but as far as relates to the property acquired by Ramkaunt, it must be upheld as valid and binding on the parties concerned; because a man is vested with full authority over his own acquisitions, which authority is defined to consist in the power of aliening it at pleasure. It must however, be observed, that where a father makes an unequal distribution of his own acquired property by reason of any one of the legal causes, such as the greater filial piety of one son, his having a numerous family, incapacity, &c. &c. he (the father) does not incur the guilt attaching to a transgression of the law; but if on the other hand he make such unequal distribution by reason of his mere arbitrary will, and uninfluenced by any one of the causes abovementioned, then (as in the case of a gift against which a prohibition exists) he incurs the guilt occasioned by an infringement of the law; but the distribution must be upheld, as valid and binding on the parties whom it concerns. This constitutes the difference. The law is the same with respect to moveable property inherited by the father. But as the father has not full authority (as defined above) over the ancestrel immoveable property, any distribution he may make, other than that which the law directs, must be considered invalid, and not binding on the parties concerned.

Authorities: 1st, *Dayabhaga*:—So *Vishnoo* says; "When a father separates his sons from himself, his will regulates the divi-

1816. **Blowanny-churn** **Bunhoojea,** **r. Ram-** **kaunt** **Bunhoojea.** sign of his own acquired wealth: but in the estate inherited from the grandfather, the ownership of father and son is equal." This is very clear. When the father separates his sons from himself, he may by his own choice give them greater or less allotments if the wealth were acquired by himself, but not so if it were property inherited from the grandfather, because they have an equal right to it. The father has not in such case an unlimited discretion.

2nd, *Dayabhaga*:—But if he make an unequal distribution of his own acquired wealth, being desirous of giving more to one as a token of esteem on account of his good qualities, or for his support on account of a numerous family, or through compassion by reason of his incapacity, or through favour by reason of his piety, the father so doing acts lawfully. *Yajnyawalkya* declares it: "A lawful distribution made by the father among sons separated, with greater or less allotments, is pronounced valid". So *Vrihaspati*: "Shares which have been assigned by a father to his sons, whether equal, greater or less, should be maintained by them; else they ought to be chastised." *Nareda* likewise: "For such as have been separated by their father, with equal, greater or less allotments of wealth, that is a lawful distribution; for the father is lord of all." Since the circumstance of the father being the lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth.

3d, *Dayabhaga*:—The father has ownership in gems, pearls, and other moveables, though inherited from the grandfather and not recovered by him, just as in his own acquisitions, and has power to distribute them unequally, as *Yajnyawalkya* intimates, "The father is master of the gems, pearls, and of all (other moveable property); but neither the father nor the grandfather is so of the whole immoveable estate."

From the above conflicting opinions of the pundits, and the authorities cited in support of them respectively, it will appear that they differed in two essential points; the first pundit asserting that a title under which there had not been occupancy, is of no avail; and the second contending, that to have this operation, the non-occupancy must be proved to have arisen from the *wilful neglect* of the party assuming the title: the first pundit also holding, that an unequal distribution made by a father of his own acquired property among his sons, cannot be binding on them, unless the father in making such unequal distribution had been influenced by some of the motives which the law enumerates as sufficient to authorize it; the other, on the contrary, considering such unequal distribution to be, though a sinful act, valid and binding on the parties concerned. The Chief Judge, after inspecting these opinions, gave notice to the parties that a fortnight should be allowed them, previously to a final decision, with a view of affording them an opportunity of adducing proofs of the accuracy of the doctrines maintained by the pundits in favour of their respective claims.

The appellant, in consequence, filed a paper containing objections to the doctrine of *Soobha Shastree*, which was adverse to his claim. It was contended in support of the doctrine maintained

by Chutoorbhooj, (namely, that a title under which there had been no occupancy is of no avail,) that the deed of partition executed by Ramkaunt must be considered to have no further operation than as an ascertainment of the different shares intended to be allotted by the father to his sons, not of itself amounting to an actual distribution; that as the father retained possession during his life-time he could not be said to have relinquished his proprietary right; and that consequently the aforesaid deed must be held null and void. In proof of this, a passage from the commentary of *Srikrishna Tercalancara* on the *Dayabhaga* was adduced: "When a father has ascertained the respective shares of his sons, for the purpose of obviating disputes which might possibly arise among them at a future period, and afterwards appears himself as the proprietor, that is not a partition; for as there is no relinquishment on the part of the father, his proprietary right still continues to exist." In opposition to the opinion of Soobha Shastree, upholding the validity of an unequal distribution made by a father among his sons of his own acquisitions, the following texts from the *Dayabhaga* were cited:

Catyayana:—But let not a father distinguish one son at a partition made in his lifetime, nor on any account exclude one from participation, without sufficient cause.

Nareda:—A father who is afflicted with disease, or influenced by wrath, or whose mind is engrossed by a beloved object, or who acts otherwise than the law permits, has no power in the distribution of his estate.

From these authorities it was inferred that the father (Ramkaunt) had no power to make the partition in question, which must therefore be considered invalid.

The respondents also filed objections to the opinion of Chutoorbhooj. They argued, that occupancy by relations, for however long a period, cannot create right; that a claim arising out of it can only be preferred by a stranger; that the circumstance of entry not having been made (unless wilful neglect be proved) cannot invalidate the right which a title deed confers: and that occupancy can avail only in the case of two litigant parties, each of whom has a title deed, the relative periods of the execution of which documents are not ascertainable; when the right will be adjudged to belong to the party in possession. Of the authorities cited in the support of this doctrine the following appeared to bear chiefly on the points:

1st, *Catyayana*:—Where possession has been enjoyed by kinsmen near and remote, it shall not be held to create property. It avails in the case of strangers only.

2d, *Nareda*:—Of claims founded on a written title deed, on oral evidence of a title, and on occupancy, the former must be preferred.

3d, *Yajnyawalkya*:—A title deed establishes a stronger right than occupancy, unless the latter has existed through successive generations.

Vrihaspati:—The moveable property acquired by partition, by purchase, by descent, or from the king, is confirmed by occupancy and lost by neglect.

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1816. *Catynyuna*:—What a man has promised, in health or in sickness, for a religious purpose, must be given; and if he die without giving it, his son shall doubtless be compelled to deliver it.

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Bunhoorjea. *Vrihaspati*:—If one field have been mortgaged to two creditors, so nearly at the same time that no *priority can be proved*, it shall belong to that mortgagee by whom it was first possessed *without force*. This is declared to be the rule also in cases of sale and gift.

The respondents also urged objections to the doctrine maintained by Chuttoorbhooj, which denied the validity of an unequal distribution made by the father (except under the influence of certain motives) of his own acquisitions. These objections were founded on the principle of the father being vested with unlimited power over this description of property, as also over the ancestral moveable estate. The texts adduced in support of this doctrine have been already cited.

It being however, satisfactorily ascertained from the replies of the pundits to the first interrogatories, that the deed of partition executed by Ramkaunt was in several respects illegal; the necessity of ascertaining the relative accuracy of the conflicting opinions of the pundits, delivered in reply to the queries subsequently put to them, was in this case superseded. In those queries it was hypothetically assumed, for the reason already stated, that the deed of partition was legal, and had been carried into effect during the lifetime of Ramkaunt; which from the admission of all parties, and of Ramkaunt himself in the petition presented by him to the Sudder Dewanny Adawlut against the attachment ordered by the Provincial Court, was certainly not the case. Considering, therefore, the deed of partition (which was never carried into effect) to be invalid, and not binding on the parties mentioned in it; the Senior Judge concurred in the opinion expressed by the Second Judge; and a final decree was passed accordingly in conformity to that opinion. The parties were advised, that unless they adjusted their claims amicably, or referred them to arbitration, it would be necessary for them to institute a fresh suit, with a view to the ascertainment of the legal shares which to they might respectively be entitled. As the plaintiff, besides his claim to set aside the deed of partition, had moreover brought forward an improper claim to obtain possession of part of the family estate, during the lifetime of his father, and as the defendants had wrongfully maintained an appeal to the Provincial Court, to uphold the validity of the deed of partition, both parties, on a general consideration of their respective claims and pleas, were directed to pay their own costs in the three Courts. (a)

(a) Although the pundits of the Sudder Dewanny Adawlut have differed upon some points in their *vyavasthas* delivered in this case, they concur in opinion that a father, in the partition of ancestral immoveable property amongst his sons, is not authorised by the authorities of Hindoo law, which are admitted to prevail in the province of Bengal, to make any unequal distribution of such property, beyond a twentieth part, in favour of the eldest son. Chuttoorbhooj states on this point, that “because no mention occurs in the *Dnyabhaga* or other law tracts, of the legality of an unequal distribution of ancestral immoveable property, beyond the authorised deductions of a twentieth, half a twentieth, &c.; because a father has not unlimited discretion with respect

to ancestral immoveable property; and because where the *Dayabhaga* upholds the validity of a prohibited gift or sale, it is always understood as a proviso that the donor be vested with power to make such transfer; an unequal distribution (over and above the authorised deductions before alluded to) of ancestral immoveable property, cannot be maintained as valid." 1816.

In like manner Soobha Shastree, after declaring that the deed of partition exhibited in this cause "is invalid, and not binding on the parties mentioned in it, as far as it goes to make an unequal distribution of the ancestral immoveable property"; and after defining the full authority which a person has over his own acquired property, "to consist in the power of aliening it at pleasure," adds, "as the father has not full authority as (defined above) over the ancestral immoveable property, any distribution he may make, other than that which the law direct, must be considered invalid, and not binding on the parties concerned."

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The above concurring opinion of the Hindoo law officers of the Sudder Dewanny Adawlut, which is confirmed by other pundits who have been consulted on the subject, and appears to be fully established by texts cited from the *Dayabhaga*, and other authorities, renders it necessary to qualify the remark annexed to the report of a cause decided by this Court in the year 1792; viz. that of Eshanchund Rai, appellant, *versus* Eshorchund Rai, respondent (*vide* vol. 1, p. 3.) It was observed in the remark here referred to, that "after extending to the case of sons, no less than to that of strangers, *Jimuta Vahana's* position, respecting gifts valid, though made in breach of the law, it becomes necessary to the consistency of the doctrine equally to maintain, that a father's irregular distribution of the patrimony at a partition made by him in his lifetime, in portions forbidden by the law, shall, in like manner, be held valid, though on his part sinful."—It was added, however, that "no opinion was taken from the law officers of the Sudder Court in this case"; and from the opinion now delivered by them, as well as from the authorities quoted by them, it is manifest that the validity of an unequal partition of ancestral immoveable property, such as is expressly forbidden by the received authorities of Hindoo law, cannot be maintained on any construction of that law, by *Jimuta Vahana* or others.

It may further be deduced from the *vyavasthas* of the pundits in this case, and the authorities cited by them, that if a father make an unequal distribution among his sons of his own acquisitions, and be influenced by the desire of giving one son a larger portion on account of his piety, or from any other motive sanctioned by the law, his act is moral, legal and valid. If he make an unequal distribution arbitrarily, without being actuated by any of the motives which the law sanctions, his act is immoral, but valid. If in making such distribution he acts under perturbation of mind, or under the operation of any cause which the law pronounces to render the father incompetent of giving more to one of his sons than to another; or in other words, to disqualify him for such a distribution, his act is immoral, illegal and invalid, and the partition made by him is absolutely null and void.

With reference to the decision passed in the case of Eshanchund Rai, *versus* Eshorchund Rai, and to a later decision in the case of Ramkoomar Neace Bachesputtee *versus* Kishenkunkur Turk Bhoosun (*vide* vol. 2, page 42,) in both of which it was assumed that a father's gift of the entire ancestral immoveable estate, to one of his sons, though forbidden by the Hindoo law, and condemned as immoral, is, notwithstanding, a valid donation, according to the *Dayabhaga*, and other authorities received in the province of Bengal, it appears proper to state, in this place, (as closely connected with the question of a father's legal competency to make an unequal partition amongst his sons of immoveable ancestral property,) that the result of an inquiry on the subject affords great reason for doubting the correctness of the two decisions above noticed, as far as they respect the ancestral immoveable estate. No exposition of the Hindoo law was taken from the law officers of the Sudder Dewanny Adawlut in the first case, as already mentioned. In the second case (that of Ramkoomar Neace Bachesputtee *versus* Kishenkunkur Turk Bhoosun) the *vyavastha* given by the pundits Chuntoorbhooj and Soobha Shastree, was *verbatim* as follows: "Should any Bramin, during the life of an elder son, make over by gift the whole of his property moveable and immoveable, ancestral and acquired, to his younger son, the gift is valid; but the act is sinful, as the gift of the whole ancestral property, moveable and immoveable, is prohibited by the *Shasters*. This *vyavastha* is given according to the authorities current in Bengal."

1816. Authorities in support of the above opinion, 1st, The text of *Vishnu* cited in the *Dayabhaga*: "When a father separates his sons from himself, his will regulates the division of his own acquired wealth." 2nd, A quotation also from the *Dayabhaga*: "The father has ownership in gems, pearls and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions; and has power to distribute them unequally, as *Yajnyawalkya* intimates: "The father is master of the gems, pearls and corals, and of all other moveables, but neither the father, nor the grandfather, is so of the whole immoveable estate." Since the grandfather is here mentioned, the text must relate to his effects. By again saying "all" after specifying "gems, pearls, &c." it is shewn, that the father has authority to make a gift or any similar disposition of all effects, other than land, &c. but not of immoveables, a corrody and chattels, *i. e.* slaves. Since here also it is said "the whole" this prohibition forbids the gift or other alienation of the whole, because immoveables and similar possessions are means of supporting the family. For the maintenance of the family is an indispensable obligation; as *Menu* positively declares: "The support of persons who should be maintained is the approved means of attaining heaven. But hell is the man's portion if they should suffer. Therefore let a master of a family carefully maintain them." The prohibition is not against a donation or other transfer of a small part not incompatible with the support of the family, for the insertion of the word "whole" would be unmeaning, if the gift of even a small part were forbidden. 3d, The text of *Yajnyawalkya* cited in the *Prayuschetta viveka*: "From the non-performance of acts which are enjoined, from the commission of acts which are declared to be criminal, and from not exercising a control over the passions, a man incurs punishment in the next world."

The authorities cited in the above *vyvustha* not appearing to support the opinion given in it, the surviving pundit, Soobha Shastree, was called upon for any explanation he might have to offer; and the following is a translation of his answer:

"The father is master of the gems, pearls, &c." This text, according to the *Dayabhaga*, extends to the property of the grandfather, according to which authority also the father has ownership in all the property inherited from the grandfather. This appears to be the case, because having propounded the texts "for they have not power over it while their parents live," "for sons have not ownership while their father is alive and free from defect," the author concludes by observing, that these texts declaratory of a want of power and requiring the father's consent must relate also to property ancestral. In the *Daya Crama Sangraha*, after propounding the text declaratory of equal ownership between the father and sons in immoveable property inherited from the grandfather, Srikrishna remarks, that this text is not to be construed literally, because it is impossible that while the father, the owner of the grandfather's wealth, survives, the sons should possess any ownership therein. The same author in his commentary on the *Dayabhaga*, in the chapter treating of partition made by a father of property ancestral and of his own acquisitions expresses himself, as follows "Although the father be in truth lord of all the wealth inherited from ancestors, &c." The word *prabhoo*, or master, which occurs in the two members of the text, "The father is master of gems, &c." cannot mean merely *swamee* or owner, but must be intended to signify a person having the power of disposing of the wealth at pleasure. Accordingly the text of the *Dayabhaga* declaring that the father is not (as he is of his own) lord of all the grandfather's wealth, has been thus commented on by Srikrishna *Terculanegara*: "Still the right here meant is not merely ownership, but competency for disposing of the wealth at pleasure; and the father has not such full dominion over property ancestral." Now in the latter part of the text commencing, "The father is master, &c." and concluding, "but neither the father nor grandfather is so of the whole immoveable estate," the meaning simply is, that the father is not competent to dispose of such wealth at pleasure. If, on the contrary, it be made to signify that the father is not owner, then it would follow, as there is no declared distinction between them, that the grandfather would not have ownership in his own acquired wealth: therefore if a father make a gift of the whole immoveable estate, it is valid, as the gift is made by one having ownership. But as the gift of the whole immoveable estate withdraws the means of supporting the family, the gift is sinful merely. It is declared in the *Dayabhaga*, that the word whole occurring in the last member of the text, "The father is master, &c." intends a prohibition, forbidding the gift or other alienation of the whole, because immoveables and similar possessions are means of supporting the

family. For the maintenance of the family is an indispensable obligation, as 1816.
Menu has said, "The support of persons who should be maintained, &c." Immediately afterwards the author states, "The prohibition, is not against a Bhowanny-donation or other transfer of a small part not incompatible with the support of the family. From the express mention of immoveables, a prohibition is inferred by the analogy exemplified in the loaf and staff, against the gift or other transfer of a corrody or slaves." In the above passages and others of a similar nature, the word prohibition has been made to apply, and wherever the gift of immoveable property has been prohibited, the reason, viz. it affording to the family means of support, has been assigned; therefore the word master occurring in the latter member of the text is used to shew the incompetency of the father to make a disposition at his own will, because immoveable property is the means of supporting the family, and if those means be withdrawn the guilt is incurred of depriving the family of subsistence. In short, as there exists a prohibition against the gift or sale of such immoveable property, if it be nevertheless given or sold, the precept is infringed.

Ramtunoo, the other pundit of the Sudder Dewanny Adawlut, (who succeeded the late Chutoorbhooj), being called upon for his opinion on the point in question, delivered the following:

The gift of the whole ancestral estate (not consisting of immoveable property, a corrody or slaves) such as pearls, gems, &c. and of the whole of his own acquired property, by a father to one son exclusively, while there are other sons living, is a valid act. If the father make a gift of a small part of the ancestral immoveable property not incompatible with the support of the family, the act is valid; but if he make a gift of the whole ancestral immoveable property, or of a corrody or slaves, the act is not valid. This opinion is in conformity with the *Dagabhaga* and other authorities current in Bengal.

Authorities in support of the above opinion, 1st, An extract from the *Daya crama Sangraha*: "But the father possesses a power in regard to ancestral property other than land (and the descriptions above mentioned) such as pearls, gems, &c. similar to that which he has in the disposal of his own acquired wealth. *Yajnyawalkya* declares, "The father is master of the gems, pearls and corals, and of all other moveable property: but neither the father nor the grandfather is so of the whole immoveable estate." Here by the specification in the first instance of gems, pearls and corals, and afterwards by the use of the word all; gold and other effects, exclusive of the three descriptions of property, consisting of land, &c. are intended. The word whole, again, which occurs in the second portion of the above text, is made use of for the purpose of shewing, that a prohibition does not exist against a gift of immoveable property, not incompatible with the due support of the family. Thus it is stated in the *Dagabhaga*." 2d, Text of *Bhuvudevu Turkalancara*: "The father has power to make a gift or other transfer of his own acquisitions and of the ancestral property consisting of gems, pearls, &c. This conclusion may be deduced from *Jimuta Vahana's* exposition." 3d, An extract from the *Daya crama Sangraha*: "A father has not the power to make an unequal distribution of ancestral property, consisting either of land, or a corrody or slaves, even though any of the causes before mentioned, namely, the superior qualifications of one particular son, &c. should exist; and the text of *Yajnyawalkya*, which declares, "The ownership of father and son is the same in land which was acquired by the grandfather, or in a corrody, or in chattels," is intended to restrain the exercise of the father's will. 4th, The text of *Bhuvudevu Turkalancara*: The following text of *Vyasa*, cited in the *Dagabhaga*, "A single parcener may not without consent of the rest make a sale or gift of the whole immoveable estate, nor of what is common to the family," relates to the prohibition of a transfer of ancestral immoveable property, or of immoveable property acquired at the expence of the ancestral estate.

In consequence of the above difference of opinion between the present Hindoo law officers of the Sudder Dewanny Adawlut, the following question was proposed to the pundits of the Supreme Court, Tarapershad and Mrityoonjyee, to Nuraburree, pundit of the Calcutta Provincial Court, and Ramajya, a pundit attached to the College of Port William.

A person, whose elder son is alive, makes a gift to his younger, of all his property moveable and immoveable, ancestral and acquired. Is such a gift valid according to the law authorities current in Bengal or not; and if it be invalid, is it to be set aside?

The following answer, under the signatures of the four pundits above mentioned, was received to this reference, on the 21st of September, 1818.

1816. If a father, whose elder son is alive, make a gift to his younger, of all his acquired property, moveable and immovable, and of all the ancestral moveable property; the gift is valid, but the donor acts sinfully. If during the life-time of an elder son, he make a gift to his younger, of all the ancestral immovable property, such gift is not valid. Hence, if it have been made, it must be set aside. The learned have agreed that it must be set aside, because such a gift is *a fortiori* invalid; inasmuch as he (a father) cannot even make an unequal distribution among his sons of ancestral immovable property, as he is not master of all; as he is required by law, even against his own will, to make a distribution among his sons of ancestral property not acquired by himself (*i. e.* not recovered); as he is incompetent to distribute such property among his sons until the mother's courses have ceased, lest a son subsequently born should be deprived of his share; and as, while he has children living, he has no authority over the ancestral property.

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Authorities in support of the above opinions:

1st, *Vishnoo*, cited in the *Dayabhaga*:—"His will regulates the division of his own acquired wealth."

2nd, *Yajnyawalkya*, cited in the *Dayabhaga*:—"The father is master of the gems, pearls, corals and of all other moveable property."

3d, *Dayabhaga*:—"The father has ownership in gems, pearls and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions."

4th, *Dayabhaga*:—"But not so, if it were immovable property inherited from the grandfather; because they have an equal right to it. The father has not in such case an unlimited discretion." Unlimited discretion interpreted by *Sricrishna Turkalincara* to signify a competency of disposal at pleasure.

5th, *Dayabhaga*:—"Since the circumstance of the father being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father, is lawful only in the instance of his own acquired wealth." Commentary of *Sricrishna* on the above texts: "Although the father be in truth lord of all the wealth inherited from ancestors, still the right here meant is not merely ownership, but competency for disposing of the wealth at pleasure; and the father has not such full dominion over property ancestral."

6th, *Dayabhaga*:—"If the father recover paternal wealth seized by strangers, and not recovered by other sharers, nor by his own father, he shall not, unless willing, share it with his sons; for in fact it was acquired by him." In this passage, *Munoo* and *Vishnoo* declaring that "he shall not, unless willing, share it, because it was acquired by himself," seem thereby to intimate a partition amongst sons even against the father's will, in the case of hereditary wealth not acquired (that is, recovered) by him.

7th, *Dayabhaga*:—"The condition 'when the mother is past child bearing,' regards wealth inherited from the paternal grandfather. Since other children cannot be borne by her, when her courses have ceased, partition among sons may then take place: still, however, by the choice of the father. But if the hereditary estate were divided, while she continued to be capable of bearing children, those born subsequently would be deprived of subsistence. Neither would that be right; for a text expresses, 'They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured.' *Sricrishna* has interpreted 'the dissipation of hereditary maintenance,' to signify the being deprived of a share in the ancestral wealth."

Dwita mrunya:—"If there be offspring, the parents have no authority over the ancestral wealth, and from the declaration of their having no authority, any unauthorized act committed by them is invalid."

Text of *Vijnyaneshwara* cited in the *Medhanti*:—"Let the Judge declare void a sale without ownership, and a gift or pledge unauthorized by the owner." The term "without ownership," intends incompetency of disposal at pleasure.

Text of *Nareda*:—"That act which is done by an infant, or by any person not possessing authority, must be considered as not done. The learned in the law have so declared."

VAKEEL OF GOVERNMENT, RAMLOCHUN GHOSE and Others, Appellants,
versus
 BANESUR NAGH and Others, Respondents. 1816.
 Dec. 30th.

THIS was a suit instituted by the respondents in the Zillah Court of Jessore, on the 19th of June 1806, against Radhamohun Ghose, Ramlochun Ghose and others, to recover 500 beegas of land, situated in *kismut* Quddumdeh, pergunna Hoogly; of which the annual produce was estimated at 501 rupees. On the admission of a special appeal by the Sudder Dewanny Adawlut, against a judgment passed by a Provincial Court, for certain lands in favour of A against B, a claim being set up by C, as he had a third party, founded on the absence of all original right on either side, the Court did not judge it necessary to enter into this further claim, but contenting itself with deciding between the former parties, left to C the option of proceeding by regular suit.

It was set forth in the plaint, that the *kismut* abovementioned was the hereditary property of plaintiffs, and was registered in the Collector's office in the name of their late father Camdeb Nagh; that the defendants in 1208 B. S., dispossessed them of 500 beegas of land lying with the limits of their estate, and had wrongfully retained possession thereof ever since; and that the present action was brought for the recovery of the same. The defendant Radhamohun Ghose denied that the land in dispute was attached to or included in the estate of the plaintiffs, and alleged that it formed a portion of Digrajpore his zemindary, which was likewise situated in pergunna Hoogly; and that in 1208 B. S., he had granted it on a *jungleboory* tenure to Ramlochun Ghose, who with the other defendants had brought it into a state of cultivation.

The other defendants pleaded the general issue, alleging at the same time, that they had cultivated the land claimed under a *pottah* granted to them by Radhamohun Ghose, and expressing their hope that should judgment be given for the plaintiffs they might be permitted to hold possession on the terms specified in the said *pottah*.

After an examination of the documents and witnesses brought forward by both parties, it appearing to the Zillah Judge to be established that the land claimed was situated within the limits of Quddumdeh, the estate of the plaintiffs, he was of opinion that the *pottah* granted by Radhamohun Ghose could not avail in favour of the other defendants, and accordingly passed a decree directing that the plaintiffs should regain possession of the lands; and declaring that it should be entirely optional with them to uphold or set aside the *pottah* granted by Radhamohun Ghose to the other defendants. The costs were made exclusively payable by Radhamohun Ghose. Ramlochun Ghose, and the other defendants (Radhamohun Ghose excepted), preferred an appeal from the above decision to the Provincial Court of Calcutta, which Court, however, concurred therein and dismissed the appeal with costs.

The appellants being dissatisfied with this award, presented a petition to the Court of Sudder Dewanny Adawlut for the admission of a special appeal, which was complied with.

At this stage of the proceedings a claim was preferred by Government to the land in dispute, on the ground of its being situated in the Sunderbunds, and the property of neither party; the Court however (present R. Ker and G. Oswald) did not consider it necessary to enquire into the validity of this claim, and after an attentive consideration of all the proceedings held in the case, concurred in

1816. the decisions passed by the Courts below, and dismissed the appeal with costs.

Vakeel of Government, Ramlochun Ghose and others, v. Banesur Nagh and others. An option was at the same time left to Government to institute a regular suit against the respondents, or other occupants, for the recovery of the lands in question; and Ramlochun Ghose and the other appellants were declared at liberty to bring an action against whomsoever they might conceive it would lie for the recovery of any sum expended by them in clearing away the jungle and bringing the lands into a productive state.

1816. **RAM BUKHSH (Pauper, Son of PUHLUAN SING, deceased),**
Appellant,

Dec. 30th.

versus

THE RANEE OF RAJA JESWUNT SING, Respondent.

On a *hibbanama* for property, real and personal, being granted by one party to another, an *ikrarnama* was executed by the donee; held that the infringement by the donee of the terms of that engagement, and his demise without possession having been obtained, invalidate any claim by his heir under the deed in question.

THIS was an action brought by Puhlun Sing, father of appellant, *in forma pauperis*, in the Zillah Court of Shahabad, on the 10th of May 1804, to recover from respondent pergunnahs Arole, &c.; the yearly produce of which was estimated at 75,000 rupees, besides jewels valued at 51,000 rupees.

It was stated in the plaint, that Raja Jeswunt Sing dying childless, his widow, the respondent, granted a *hibbanama* or deed of gift in his (plaintiff's) favour, thereby making over to him the whole of her deceased husband's estate, real and personal; that she on the same date procured from him an *ikrarnama*, whereby he bound himself to remain subordinate to her during her lifetime, and to acknowledge her right to the estate; that she gave him entire possession of the estate, and caused his name to be registered as proprietor of the same in the Collector's office; that in 1209, F. S. by the evil advice of interested persons, she procured the registry of the lands in her own name. and that the present suit was brought for the recovery of the estate and jewels under the deed of gift in his favour.

The defendant, in answer, stated that the plaintiff had fraudulently and without her concurrence procured her *vakeel's* signature to the deed of gift on which he brought this action; that being apprized that the plaintiff had, in collusion with her agents, procured the registry of his name in the Collector's office, she brought the fraudulent transaction in question to the notice of the Collector, who immediately entered her name in the books as proprietor of the estate in the room of that of the plaintiff; and that the *hibbanama* could in no wise avail in favour of the plaintiff, as the *ikrarnama* which he admitted to have executed to her annulled the deed of gift.

This engagement was dated the 5th *Suffur* 1206, *Hijree*, and was in substance as follows: "The donor will retain full possession of the estate during her lifetime; while I shall remain in every respect subordinate to her, and on her demise succeed to the estate."

The Zillah Judge being of opinion that the *ikrarnama* granted by the plaintiff rendered his claims under the deed of gift inadmissible, dismissed the suit with costs. 1816.

The plaintiff demised at this stage of the proceedings, and his son (the appellant) preferred an appeal to the Provincial Court of Patna, which Court affirmed the decision passed by the Zillah Judge and dismissed the appeal with costs. Ram Bukhsh, v. the Rajnee of Raja Jeswunt Sing.

On a further appeal by the appellant to the Sudder Dewanny Adawlut, this Court (present R. Ker and W. E. Rees) were of opinion as the *ikrarnama* bore the same date as the deed of gift; as the donee had acted in violation of the terms of the engagement entered into by him; and as he had demised before the donor, without having obtained possession under the deed of gift, that the appellant, his son and heir, could not maintain any claim to the estate under the *hibbanama*, and accordingly dismissed the appeal with costs, affirming the decisions of the Courts below.

SHEONURAIN CHOWDRY and Others, Appellants,

1817.

versus

KOWLAKAUNT GOSAIN and Others, Respondents.

Jan. 25th.

THIS action was brought by Kowlakaunt Gosain, and by the father of the other Respondents, (who demised when the cause was pending before the Court of Sudder Dewanny Adawlut) on the 24th of August 1807, in the Zillah Court of Rungpoor, against Sheonurain and others, for the purpose of compelling them, under clause 1, section 63, regulation 8, 1793, to grant an acquittance for the sum of 657 rupees, 8 anas, and 2 cowries, on account of three years rent of *kismut* Gopeenathpoor and mouza Mocuddumpoor, their talook, situated in pergunnah Singsheher, the zemindary of the defendants, for which sum a receipt had been refused at the periods of payment, and further, to grant them receipts in future for the rent annually payable by them. The plaintiffs sued, as dependant talookdars, to obtain from the zemindar receipts paid by them. The zemindar was willing to grant receipts to the plaintiffs as *ijaradars*, but not as talookdars. The courts, on proof that the plaintiffs that the zemindars (the defendants) had refused to grant them receipts for the amount of the *jumma* paid by them during the years 1211, 1212 and 1213, B. S., and that they had therefore instituted the present action.

It was set forth in the plaint, that the plaintiffs were proprietors of a dependant talook, assessed at a fixed annual *jumma* of 219 rupees, 2 anas, 13 gundas and 2 cowries, payable into the cutchery of the defendants, in conformity with the provisions of a decree passed in favour of their father in the Zillah Court of Rungpoor, and affirmed on appeal by the Provincial Court of Moorshedabad; that the zemindars (the defendants) had refused to grant them receipts for the amount of the *jumma* paid by them during the years 1211, 1212 and 1213, B. S., and that they had therefore instituted the present action. The defendants, in answer, admitted that it had been determined, as alleged by the plaintiffs, that the lands held by them were not subject to any increase of assessment, but alleged that the father of the plaintiffs, in collusion with the ministerial officers of the Zillah and Provincial Courts, had obtained in his favour the decrees pleaded by the plaintiffs; that the tenure of the plaintiffs was grant them receipts as such. The cause of the refusal to grant receipts being

1817.

a dispute concerning the tenure, the provisions of section 63, regulation 8, 1793, were not considered applicable to the case.

merely an *ijara*, and not a dependant talook; that they were willing to grant receipts to the plaintiffs as *ijaradars*, but could not recognize their title to hold as talookdars, or grant them receipts as such.

It appearing to the Zillah Judge, that the present dispute originated in a refusal on the part of the defendants to grant receipts to the plaintiffs as talookdars, and in a refusal on the part of the latter to accept receipts from the defendants, wherein they were styled *ijaradars*, he considered that clause 1, section 63, regulation 8, 1793 (a), was irrelevant to the case; he passed a judgment dismissing the claim of the plaintiffs to damages under that section, and providing that the costs of suit should be borne by the parties respectively. But it being satisfactorily established, that the plaintiffs were the holders of a talookdary tenure, it was adjudged, that the defendants should in future grant receipts for each *kist*, or instalment of rent, paid to them by the plaintiffs, drawn out according to the following form; "We, the zemindars of pergunnah Singshetur, have received such a sum from the talookdars of mouza Mocuddumpoor and *kismut* Gopeenathpoor, &c." and at the conclusion of every year, grant them an acquittance in full of the amount, paid by them, on account of their fixed annual rent, drawn out according to a similar form.

The decision of the Zillah Judge was confirmed by the Provincial Court of Appeal of Moorshedabad, and by the Court of Sudder Dewanny Adawlut (present R. Ker and G. Oswald), on successive appeals being preferred therefrom by Sheonarain and the rest of the appellants to those Courts. The costs on the appeal in both Courts were made chargeable to the appellants.

(a) The clause referred to directs the landholders and their agents to give receipts for all sums received by them, and adds, "any person to whom a receipt may be refused, on his establishing the same in the Dewanny Adawlut of the Zillah, shall be entitled to damages, from the party who received his rent or revenue, and refused the receipts, equal to double the amount paid by him."

KOONWUR INDURJEET CHOWDRY, Appellant,

1817.

versus

RADHEH KISHEN, Respondent.

Feb. 7th.

THIS action was brought in the Zillah Court of Furruckabad, on the 16th of May 1804, by Oodehchund Chowdry, father of the appellant, to recover possession of mouza Surdeh Mye, per-gunnah Chupramow, from Radheh Kishen and Polinder Sing, the defendants. A judgment given against the dependant of a lauded proprietor, who had taken a farm of his land, by desire of the proprietor, not held to be conclusive against the latter, as the suit was not defended under his directions, or with his knowledge.

The plaintiff stated, that the village in question was sold to Mahanund Chowdry, his elder brother, by Polinder Sing, Domun Sing and Aneek Sing, the *zemindars* and *maliks* thereof, in the year 1198, F. S., for the sum of 761 rupees; and that it remained in his possession till his death, after which the plaintiff retained possession as *malik*; that at the settlement of 1210, F. S., he got Jeetram, a dependant of his, to engage for the village as farmer, but that he himself still managed the collections, the said Jeetram simply paying the instalments, as they became due, to the Collector; that in 1211, F. S., Radheh Kishen, an inhabitant of the village, conspiring with Polinder Sing, brought a suit in the Zillah Court for possession thereof as *zemindar*, and obtained a decree against Jeetram, the farmer, and in virtue of that decree got possession from the Collector; that during the time this transaction took place, he was distracted with grief at the death of his father and a brother, and that he was not aware of the institution of the suit, so that he could not interfere; he therefore brought this action to recover possession of the village as purchased by his brother, and pleaded that the decree against Jeetram could not affect his claim.

The defendants denied the plaintiff's right to the village, which, they stated, had been the hereditary estate of Radheh Kishen and his family for hundreds of years; and that they retained possession thereof till the settlement in 1210, F. S., when the plaintiff, having tried, though unsuccessfully, to get the village in his own name, made Jeetram Kanoongoe, a dependant and *gomastah* of his, engage as farmer; that Radheh Kishen, on being dispossessed, sued Jeetram, and obtained a decree in virtue of which he was put in possession by the Collector; that Polinder Sing was not *zemindar*, but only a *karindeh* of Radheh Kishen, and could not therefore dispose of the estate; but that the brother of the plaintiff, who was then *tehsildar*, forced him to execute a deed of sale for the village, although he (Polinder Sing) declared that he had no right therein. Radheh Kishen stated further, that Khuluk Sing and Rogobheer Sing having sued him for the zemindary, their suit was dismissed; and pleaded that this present suit was not cognizable under the regulations, the right to the zemindary having been twice decreed in his favour.

The defendants filed no proofs. The Zillah Judge, on perusal of the evidence of the witnesses, considered it to be fully established, that the village was the zemindary and *milk* of Polinder Sing and the others; and that these persons sold it to Mahanund Chowdry, the brother of the plaintiff. He did not consider the

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Koonwur
Indurjeet
Chowdry,
v. Radheh
Kishen.

decree, obtained by the defendant Radheh Kishen against the farmer Jeetram, of any avail against the plaintiff, as the latter was not a party to the suit. He therefore passed a decree directing, that the plaintiff should be put in possession of the village; and that the costs of suit should be charged to the defendants.

Radheh Kishen, one of the defendants, being dissatisfied with this decision, appealed to the Provincial Court for the division of Bareilly. His appeal being admitted, he filed copies of the two decrees above alluded to.

The Provincial Court observed, that the zemindary, which was the cause of action in the present suit, had formerly been decreed to the appellant, (Radheh Kishen,) and that he had been put in possession of the village by the Collector, under the orders of the Zillah Court in execution of the above decree; they were therefore of opinion, that the claim of the respondent to the zemindary in question was barred by section 10, regulation 2, 1803, (by which "the Zillah Courts are prohibited from entertaining any cause, which, from the production of a former decree, shall appear to have been heard and determined by any former Judge;") and reversing the decree of the Zillah Judge, directed that possession of the village should be restored to the appellant, who had been dispossessed in execution of the Zillah decree, and that the respondent should defray the costs of suit.

Oodehchund, being dissatisfied with the decision of the Provincial Court, presented a petition to the Court of Sudder Dewanny Adawlut, praying the admission of a special appeal. The Court did not consider the section above quoted applicable to this case, as the petitioner was not a party to the suit, by which the Provincial Court considered his right of action to be barred; they therefore recommended the petitioner to apply to the Provincial Court for a review of judgment. He did, in consequence, petition that Court for a review, but the Court were of opinion, that as Jeetram was a dependant of Oodehchund, and that though the former was ostensibly in possession of the village, the latter, who collected the rents, was the *bonâ fide* possessor thereof, the decision of the Zillah Court in the original case was binding on him. They therefore rejected his petition, and he again applied to the Court of Sudder Dewanny Adawlut for the admission of a special appeal. The Court, for the reasons before stated, admitted the appeal. Oodehchund Chowdry having demised, his son Koonwur Indurjeet carried on the appeal. Radheh Kishen having omitted to appear to defend the appeal, it was decided *ex parte*.

The Court were of opinion (present W. E. Rees and G. Oswald), that the decree obtained by Radheh Kishen against Jeetram could not be considered as barring the plaintiff's right of action in the present case, as Oodehchund was not a party in the suit: and that it did not appear that Jeetram, though a dependant of Oodehchund, had any authority from him to defend the suit on his part, or even gave him information that such suit had been instituted. It further appeared to the Court, that the plaintiff had clearly established his right to the village, by his brother's purchase of the zemindary from the former *maliks*. They therefore reversed the decree of the Provincial Court, and confirmed that passed by the Zillah

Judge, with directions that the appellant in this Court should be put in possession of the village, and that the respondent should account to him for the mesne profits of the period during which he had possession; also that the respondent should pay the costs of suit in all the Courts.

RAJAH GOPEENAUTH and BANEEKAUNT RAI, Appellants, 1817:

versus

MUSSUMMAUT JYAPUTTEE, (Widow of CHUNDEE CHURN, Feb. 6th. deceased), Respondent.

THIS action was brought by the late Chundee Churn, *in formâ pauperis*, in the Zillah Court of Jessore, on the 12th of September 1806, against Doorga Churn Mookurjea, Ramjye Bannorjea and others, for possession of mouza Helanchee, situated in pergunna Saeedpore, assessed with an annual fixed *jumma* of 357 rupees, and estimated to produce an annual profit of 613 rupees.

It was set forth in the plaint, that the mouza in question had been held by the plaintiff from the year 1195, B. S. until 1203, B. S., at a fixed annual *jumma* of 357 rupees, under a *pottah* granted in his favour in the year 1165, B. S., by Sreekaunt Rai, the late zemindar; that the property of the said Sreekaunt Rai was brought to sale by the Sheriff of Calcutta in the year 1204, B. S., and was purchased by Doorga Churn Mookurjea, in the name of Ramjye Bannorjea; that the said purchaser continued to receive from him the amount of *jumma* demandable from him under the provisions of the abovementioned *pottah*, without making any objection there- to, till the year 1206, B. S., and in the year 1209, B. S., instituted a summary suit against him, for the recovery of a balance which had accrued up to that year, on which occasion the suit was referred for decision to the Collector, when the payment of the balance was adjusted, with reference to the amount of *jumma* stipulated in the *pottah* in question; that he was unjustly dis- possessed of the mouza in dispute, on the 20th *Bhadoon* 1209, B. S., by Kowlakaunt and the other defendants: that he instituted a summary suit under regulation 49, 1793, for possession, which was dismissed on the grounds of informality; and that he had therefore brought the present action.

The defendant, Ramjye Bannorjea, in his answer, denied, in general terms, that the mouza in dispute had been granted to the plaintiff, at a fixed annual *jumma*, and pleaded that the said mouza had been leased out in farm, betwixt the year 1195, B. S., and the year 1203, B. S., to several persons, and amongst them to the father of the plaintiff, at a variable rate of *jumma*: that at the time he purchased the pergunna, he was wholly unacquainted with the resources of the mouza in dispute, and received from the plaintiff the sum alleged by the latter to have been paid by him on account of rent; that on making a general measurement of the

1817. land comprised in the pergunna, he had ascertained that there were 1,315 beegas of land comprehended in the mouza claimed by the plaintiff, assessable at the pergunna rates with the sum of 1,413 rupees annually; and that as the plaintiff, on the prescribed proclamation being made, had refused to enter into fresh engagements with him for the said mouza, when so assessed, he attached the same, under the provisions of regulation 7, 1799.

Rajah Gopeenauth and Baneekaunt Rai, v. Mussummaut Jyaputtee.

The *pottah*, on which the plaintiff rested his claim, was dated the 16th *Chey*t 1195, B. S., and was in substance as follows: "I, Sreekaunt Rai, zemindar of pergunna Saeedpore, hereby grant mouza Helanchee to Chundee Churn and his heirs for ever, at a *jumma* of 6 anas per beegah. On a measurement of the lands taking place, at any time, he will pay at the above specified rate for such quantity of lands as may then appear to be comprised in the mouza; but his lands shall ever be exempt from a higher rate of assessment than 6 anas *per* beegah. Until a measurement of the lands shall take place, he will continue to pay the sum of 357 rupees."

The Judge of the Zillah Court observed, that the plea adduced by the defendant, that the mouza in question was merely an *ijara* or farm, was wholly inadmissible, because, if the plaintiff's tenure had been a farm, the defendant would not have instituted a summary suit for the recovery of a balance of *jumma*, and would not have made the proclamation, requiring the attendance of the plaintiff, for the purpose of his entering into fresh engagements for the mouza; and that it did not appear that the lands had been actually measured. On these grounds, therefore, and for other reasons detailed in his decree, he passed a judgment in favour of the plaintiff; which provided that he should be put into possession of the mouza in dispute, assessable with an annual fixed *jumma* of 357 rupees, until an actual measurement of the same should take place, at which time the mouza should be assessed at the rate of 6 anas for each beegah, then ascertained to be comprised in it. The costs were made chargeable to the defendants.

An appeal was preferred from this decision to the Provincial Court of Calcutta, by Gopeenauth and Baneekaunt, who, in the mean time, by an order of the Supreme Court, had become the proprietors of pergunna Saeedpore. That Court, concurring in the decision passed by the Zillah Judge, affirmed it, with costs chargeable to the appellants.

Gopeenauth and Baneekaunt preferred a further appeal to the Court of Sudder Dewanny Adawlut, estimating their claim at 9,201 rupees, or ten times the difference betwixt the sum they were entitled to receive under the decree of the Provincial Court, and the sum assessable on the mouza according to the pergunna rates. Chundee Churn demised at this stage of the proceedings, and Mussummaut Jyaputtee, his widow, appeared to defend the appeal. The Court, on consideration of all the documents and evidence which came before them, were of opinion, either that the husband of the respondent had, by fraudulent means, procured the signature of Sreekaunt Rai to the *pottah*, on which he rested his claim; or, that Sreekaunt Rai had himself fraudulently granted the said *pottah benamee*, in favour of Chundee Churn, with the

view of appropriating the profits of the mouza in dispute to himself; that, however the case might be, it was satisfactorily established, that the *pottah* was never acted on, and that the lands specified therein, both previous and subsequent to the date of the execution thereof, were leased out by Sreekaunt Rai, both in *ijara* and *kutkuneh*, to different persons, and at a variable rent; on these grounds, and under all the circumstances of the case, the *pottah* in question was deemed wholly invalid. A final judgment was accordingly passed by the Court of Sudder Dewanny Adawlut (present J. Fombelle and W. E. Rees) reversing the decisions passed by the Courts below; and as it was stated by the *vakeels*, that the Zillah decree had been carried into execution, it was ordered, that the respondent should render to the appellant an account of the mesne profits, (or the difference between the sum actually paid to the appellants, and the sum which would have been demandable by them according to the pergunna rates on measurement of the lands,) from the date on which possession was given under the decree of the Zillah Court, up to the date of the final decree; also that the appellants should be entitled to assess the lands in future at the pergunna rates. The costs in all the Courts were made payable by the respondent.

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Rajah Go-
peanauth
and Bane-
kaunt Rai,
v. Mussum-
maut Jya-
puttee.

JOANNA FERNANDEZ, Appellant,

1817.

versus

DOMINGO DE SILVA, and ANTHONY LIBRA, Respondents. Feb. 12th.

CAPTAIN Herbert Sutherland, a native of Scotland, and commander of a British trading vessel on the coast of Chittagong, obtained, in the year 1763, from Mr. Verelst, chief of the Provincial Council at Chittagong, a written grant of land for a small island and village, called Cootubdea, which he was to bring into cultivation, and hold in perpetuity, free of assessment, for the support of himself and family. He accordingly possessed it until his death. He was supposed to have been a Protestant, but was married to a native Roman Catholic of Portuguese extraction, named Mesellina Fernandez, by whom he had issue Charles Sutherland, who appeared to have been brought up in the Catholic faith. Charles Sutherland succeeded his father in the Cootubdea estate, and held it until his death, which occurred March 1790. In August 1782, after his succession to the estate, he was married by a Portuguese priest at Chittagong to a woman, named in the marriage certificate, Susanna De Rozario, who professed the Roman Catholic religion, but was born of heathen parents, of the class of people called Birmans, being a heterodox sect of Hindoos. Charles Sutherland left at his death, besides Martha Mercado, his maternal grandmother's half sister, his said wife Susanna, and Joanna Fernandez, his maternal cousin-german, viz. the daughter of Cymon Fernandez, his mother's full brother.

By the Portuguese law of inheritance, one moiety of the estate of the husband devolves at his death on his widow, and the other moiety on his next of kin. According to this law, a distribution was directed to be made of the landed estate of a deceased person; but his wife dying,

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and several claims to her moiety being preferred, it was subsequently discovered, that the deceased husband was a British subject. As he left no heirs, (the relations of a mother, or of a wife not being heirs to real property, according to English law,) decreed that the estate should revert to Government, by whom it was originally granted to the father of the deceased.

A will was set up by Martha Mercado, as having been executed by Charles Sutherland; but in consideration of the state of his mind at the time of its execution, it was, at the suit of his widow, declared invalid by the Court of Sudder Dewanny Adawlut, who determined, on the 17th of March 1791, that his estate should be divided among his surviving heirs, in such proportions as should be found to be consonant to the customs and usages of the native Portuguese in this country. The widow Susanna was then living, but died in the month of October 1791, leaving, (as far as known,) no legitimate heirs of the Roman Catholic faith; but three Birmanians, named Roop Sing, Keos, and Teetoo, who stated themselves to be her kindred, (viz. the former, her maternal first cousin, and the two latter, paternal first cousins), claimed the right of succession to her estate, as next of kin. On the 5th of June 1794, the Court of Sudder Dewanny Adawlut, after consulting several persons conversant with the Portuguese law of succession, as applicable to the case, and being advised by them, that when no special agreement subsists between the husband and wife, the latter, at the death of the former, succeeds to a moiety of his estate, the other half devolving on the husband's nearest relations, passed a provisional judgment accordingly; but the widow Susanna being then dead, it became necessary to ascertain her legal heirs, before it could be finally decided to whom one moiety of the Cootubdea estate should be granted. The other moiety, belonging to the nearest consanguineous relations of Charles Sutherland, was adjudged, in the month of January 1798, by a decree of the Chittagong Court, to Joanna Fernandez (the appellant), as being his maternal cousin-german, and she was put in possession accordingly.

Shortly afterwards, in the same month, the respondents set up a claim to the moiety of the estate adjudged to the widow Susanna, in virtue of a deed of *hibeh-bil-iwuz*, or gift for consideration, alleged to have been executed by that person in their favour; and this document being deemed genuine, they were declared to be the legal proprietors.

On the 19th of February 1798, the appellant, Joanna Fernandez, brought this action against the respondents in the Zillah Court of Chittagong, setting forth in her plaint, that the deed exhibited by them, in virtue of which they gained possession, was a forgery; and that she (the plaintiff), being the nearest surviving relation of Charles Sutherland, was entitled to succeed to that moiety also of his estate which had been adjudged to his widow. The decennial produce of the moiety claimed was estimated at rupees 8,000.

The Zillah Judge, considering that the evidence adduced was sufficient to prove the forgery, and that the right of succession vested in the plaintiff, decreed to her possession of the whole estate with costs against the defendants.

Domingo De Silva and Anthony Libra being dissatisfied with the above decision, appealed from it to the Provincial Court of Dacca. and the Judges of that Court being of opinion that the evidence to the forgery was vague and unsatisfactory, and that Joanna Fernandez could have no claim to succession, the decree

of the Zillah Judge was reversed; and the costs of suit were made payable by the parties respectively. 1817.

A further appeal was preferred by Joanna Fernandez to the Sudder Dewanny Adawlut, and an application was received, about the same time, from the Board of Revenue, intimating that no one of the claimants had any right to the estate, and praying that an order might be passed for its being delivered up to the Collector. It appearing clear, from all the evidence adduced, that Herbert Sutherland, the original grantee, was a British subject, reference on the subject was made to the Advocate General, accompanied by a list of the claimants, and a statement of the facts of the case; and that officer was requested to state for the information of the Court, to whom, on the death of the husband, the landed estate of Cootubdea, referred to in the statement, would have legally devolved, according to the law and established usage applicable to the case. The following is an extract of the opinion received in reply: "It appears from the case, that Herbert Sutherland was a British subject, and the first who got the land. His son Charles was also a British subject; and his real estate could only, (although his wife was a Catholic), descend to his heirs, according to the English law. Of these it does not appear that he had any; for as the estate descended to him from his father, although the wife was by that law entitled to dower, no relation of his mother, or of his wife, could succeed as heir to the real estate descended from his father; so that, in fact, on the death of Charles, there was no heir to him existing, and the real estate then escheated, subject only to Susanna's dower."

On consideration of the above opinion, and the fact before unknown, that Herbert Sutherland was an European British subject, (which rendered his legitimate son, Charles Sutherland, also a British subject), the Senior Judge was of opinion, that the lands, granted by Mr. Verelst to Herbert Sutherland in 1763, became an escheat, on the death of his son Charles in 1790; and consequently, that the claim of succession to a moiety preferred, in virtue of a deed of gift from the widow, as well as that by her relations, Keeoos, Teettoo, and Roop Sing (who still persevered in their claims), should be disallowed; that the moiety, adjudged to the widow of Charles Sutherland, should be declared to have escheated, for although the judgment of 1794 would be thereby virtually set aside, yet the Government were not parties in that cause, which was decided between the widow and another individual. But with respect to a moiety of the estate made over to the appellant by a decree of the Chittagong Court, passed on the 8th of January 1798, which was not appealed from, the Senior Judge expressed his doubt as to the competency of the Court to dispossess her on a summary application. He observed, that the Board of Revenue might take possession on the part of Government of that moiety, (if it should be deemed proper so to do), under the provisions of regulation 19, 1810, leaving the appellant, if dissatisfied, to sue under section 15 of that regulation.

Previously to the decision, it became necessary to ascertain in what manner the estate, if declared an escheat, should be disposed

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ny Libra.

1817. of; and the Officiating Advocate General being referred to, declared his opinion, that if the estate, originally granted to the father of Charles Sutherland, should be considered to have determined on the death of the latter without heir, it would revert to the Honorable Company, and not escheat to the Crown. On the 12th of February 1817, a final decree was passed by the Court of Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) dismissing the claims of all the parties to that moiety of the estate adjudged to the widow, by the decision of the 5th of June 1794; and directing, that it should be made over to the Collector of Chittagong on the part of Government. With respect to the moiety adjudged to the appellant Joanna Fernandez by a decree of the Judge of Chittagong, passed on the 8th of January 1798, the Court did not think proper to order that she should be dispossessed, on a summary application to that effect from the Board of Revenue, but observed, that if that person, after being informed of the rights of Government should refuse to enter into an adjustment of the public claims on the lands in her possession, the Board of Revenue were at liberty to act as they might think proper, for the purpose of securing the rights of Government, under the provisions of regulation 19, 1810, leaving the appellant, if dissatisfied, to sue in conformity with section 15 of that regulation. (a)

1817. AMEER BUKHSII, and Others (Paupers), Appellants,
 Feb 27th. *versus*
 MOOHUMMUD MOOSTUQUEEM KHAN, and Others,
 Respondents.

A *mokurreree pottah* or lease at a fixed rent, granted by one of the heirs of a deceased *altumghadar*, acting as *mokhtar* (or managing agent) of the rest of the heirs set aside; it appearing that it had been granted without their knowledge and concur-

IT appeared that certain *altumgha mehals*, possessed by the late Nuwaub Moozuffir Khan, were attached by Government, on the 29th of January 1798, when Kesree Singh was deputed as *aumeen* to collect the rents; that it having been brought to his notice, that mouza Bureawun was improperly held as a *mokurreree* tenure (or tenure at a fixed rent) by Moohummud Ahsun, he applied for, and obtained permission from the Court to call upon that person to shew proof of his title to hold it, as a tenure of that description; that Moohummud Ahsun's *mokhtar* (or managing agent), thereupon produced before the said *aumeen* a *mokurreree pottah* for the mouza in question, granted in his constituent's favour by Kureemoonissa, widow of Moqueem Khan, one of the heirs of the deceased Nuwaub, in the commencement of the year

(a) Had this case been decided according to the law of Portugal, the decision would have been the same; as it appeared from a communication with some professors of the law at Goa, (who were latterly consulted,) that by a special law of Portugal, termed the *Mental*, and applicable to this case, all grants made by the crown, and sub-grants made by any great donees of the crown, become escheats, on failure of the legitimate descendants of the original donee; relations not in the direct line being excluded.

1200 F. S.; that the other heirs of the late Nuwaub denied before the *aumeen*, that the *pottah* in question had been granted with their concurrence; that the *aumeen* represented these circumstances to the City Judge, who, on the 28th of January 1799, in the presence of the aforesaid *mokhtar*, directed the *aumeen* to institute a suit against Moohummud Ahsun, for the annulment of the said *pottah*, and for the recovery of the sum of 1,325 rupees, on account of the under-rated assessment from the 19th *Magh* 1205, F. S. (29th of January 1798), up to the month of *Magh* 1206, F. S. (February 1799); and that the present suit was accordingly instituted by the said *aumeen* against Moohummud Ahsun in the City Court of Patna, on the 4th of May 1799, when the claim was stated as above.

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rence, and that he was not specially empowered by them to grant such *pottah*.

It was set forth in the plaint, that the accounts in the *kanoongoe's* office shewed that the mouza in question yielded an annual produce of 1,200 rupees; that Mussumaut Kureemoonissa had granted the *pottah* above mentioned, without the concurrence of Illahee Bukhsh and the other heirs of the deceased Nuwaub; and that the *pottah* was therefore invalid. The plaint concluded by claiming that the *pottah* should be set aside, that the mouza should be held *khas* by Government, and that the sum of money, above stated, should be paid by the defendant.

The defendant pleaded in answer, that Moqeen Khan was appointed by the other heirs of the late Nuwaub to be *mokhtar* on their behalf, and manager of the *altumgha mehals*; that the said Khan, in 1199, F. S., granted two *mokurreree pottahs* for the mouza in question in his favour, at an annual *jumma* of 451 rupees; that on his demise, his widow Mussumaut Kureemoonissa became possessed of the *altumgha mehals* in question, and acting as *mokhtar* on the part of the other heirs, she, in the year 1200, F. S. (A. D. 1792-3) granted him a further *mokurreree pottah* for the mouza above mentioned, at the same annual *jumma* of 451 rupees; that on this, he presented a petition to the other heirs of the deceased Nuwaub, praying them to confirm the grant to him; that these persons, in acknowledgment of their concurrence in the grant, affixed their seals to the said petition, and that the *mokurreree pottah*, granted by Kureemoonissa, and the petition above mentioned, rendered the claim of the plaintiff, to set aside the *pottah* and recover the sum claimed, on account of under-rated assessment, wholly inadmissible.

The defendant filed the *mokurreree pottah*, stated in his answer to have been granted in his favour by Mussumaut Kureemoonissa, and demised at this stage of the proceedings.

Due proclamation was made for the attendance of his heirs; and in consequence of their non-attendance, the cause was decided *ex parte* by the City Judge, who considered that the *mokurreree pottah*, granted by Kureemoonissa, could not be binding on Illahee Bukhsh and the other heirs of the deceased Nuwaub; but that the plaintiff had failed to prove that the assessment of the mouza was under-rated. A judgment was accordingly passed by the Judge of the City Court, providing for the annulment of the *pottahs*, and directing that possession of the mouza in question should be given to the heirs of the deceased Nuwaub; the attachment having been removed from their estate, previous to the date of his decree.

1817. After an appeal had been preferred by the widow of the defendant from the above decision to the Provincial Court of Patna, she demised; and Ameer Bukhsh and others appeared, as her heirs, to prosecute the appeal, which was defended by Moostuqem Khan and the other heirs of the deceased Nuwaub, who persisted in denying that they had affixed their seals to the petition alluded to by the defendant in his answer, as confirmatory of the *pottah* granted by Kureemoonissa. That Court concurring in the decision passed by the City Judge, confirmed it, and dismissed the appeal with costs.

Ameer
Bukhsh, v.
Moohum-
mud Moos-
tuqem
Khan, and
others.

On a further appeal from the above decision to the Sudder Dewanny Adawlut, the following documents were filed by the appellants:

1st, A *mokurreree pottah*, granted by Moqem Khan, in favour of Moohummud Ahsun, on the 13th *Showal* 1196, F. S. (18th of July 1788) and reciting in substance, that the rent of mouza Burreawun had been fixed in perpetuity at the sum of 451 rupees.

2d, A *mokurreree pottah* also granted by Moqem Khan in favour of Moohummud Ahsun, on the 25th *Showal* 1199, F. S. (16th of June 1792) purporting to grant the said mouza as a *mokurreree* tenure to him and his heirs.

3d, The petition alluded to by the defendant in his answer, as confirmatory of the *pottah* granted in his favour by Kureemoonissa.

The Court observed, that the *mokurreree pottahs* granted by Moqem Khan to Moohummud Ahsun could not avail in favour of the appellants, as it appeared on reference to the *mokhtarname*, dated the 10th *Rajjib* 1187, F. S. granted to Moqem Khan by the heirs of the late Nuwaub, which document was filed in another cause (Illahee Bukhsh, appellant, *versus* Mussumaut Kureemoonissa, respondent,) previously decided by the Court, that no authority was thereby vested in Moqem Khan to grant *mokurreree pottahs* for the lands comprizing the *altumgha mehals*.

With respect to the petition adduced by the appellants, as confirmatory of the *pottah* granted by Kureemoonissa, the Court observed, that the *mokhtar* of Moohummud Ahsun did not make any mention of the existence of such a document, either to Kesree Sing, the *aumeen*, when the question respecting the validity of the *pottah* was first agitated by him, or subsequently to the City Judge, when he passed the order, directing the said *aumeen* to institute the present suit. The Court therefore discredited this document, and were of opinion that the appellants could not maintain any claim to hold the mouza in dispute, as a *mokurreree* tenure.

The Court accordingly (present R. Ker and G. Oswald) upheld the decisions passed by the City Judge and by the Provincial Court and dismissed the appeal. The order usual in the case of pauper suitors was given with respect to costs.

MUSSUMMAUT KUREEM-OONISSA, Appellant,

versus

RUHEEM ALI, Respondent.

THIS action was instituted *in forma pauperis* in the Zillah Court of Furruckabad, on the 11th of November 1808, by the plaintiff, to recover from the defendant, her husband, the sum of 21,000 rupees on account of dower; and was afterwards transferred, under the provisions of regulation 13, of 1808, to the Provincial Court of Bareilly.

The plaintiff stated, that she was married to the defendant in the year of the *Hijree* 1211, she being then eight years old; and that her dower was fixed at 21,000 rupees; that the defendant, at the instigation of his father, Fyz Ali, divorced her in the year of the *Hijree* 1223, and expelled her his house, on which she went to her father's; that previously to the divorce he had ill-treated her, and neglected to supply her with food and clothes; and that, as he was now about to marry another wife, she had instituted this suit to recover the amount of her dower.

The defendant denied having divorced the plaintiff. He stated, that at the time of the marriage, they were both minors, he being nine years old; that the dower was fixed at 500 *tunkas* and 2 *danars*; that since the marriage, she had lived but a short time in his house, and for seven years had been living in a very disreputable way in her father's house; that on hearing this, he, at one time, brought her back to his own house, where she remained for a few days; that she being anxious to go and visit her father, he, after much persuasion, had allowed her to go, on condition of her returning when sent for; that notwithstanding his repeated entreaties, her father had refused to give her up. He also stated that during her residence in his house, he supplied her with food and raiment to the best of his ability; but that he was not called upon by the law to maintain her during her stay in her father's house contrary to his wishes.

It was proved by the evidence of witnesses, that the dower was fixed, by a verbal agreement, at the time of the marriage, at 21,000 rupees, and that the parties were then minors, he being ten, and she about eight years of age; but it does not appear, nor does the plaintiff herself assert, that the defendant, on coming of age, ever confirmed the said verbal agreement. The following question was therefore put to the *Moulavee* of the Zillah Court of Bareilly, (the *Cauzee* and *Mooftee* of the Provincial Court being both on the circuit,) "Two persons of the Moohummudan religion marry; and at the time of the marriage, the bridegroom is ten, and the bride eight or nine years of age; the bridegroom, at the marriage, in the presence of witnesses, makes a verbal acknowledgment, that he is indebted to the wife so many thousand rupees, as dower, but no written agreement is executed; a dispute arising after the marriage, the wife goes to her father's house, and some years afterwards, sues the husband to recover her dower, on plea of a divorce. Under these circumstances, is the sum of money, which the defendant, (being then a minor,) verbally acknowledged himself indebted to the wife as dower, demandable from him, or not?" The

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Mussum-
mant
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oonissa, v.
Ruheem
Ali.

Moulavee gave the following answer, " In the marriage of minors, the presence of the parents is necessary to secure the dower. If the father, or grandfather of the defendant had been present in the marriage assembly, and the marriage contract had been entered into with his consent, or in case neither were present, if the defendant on their behalf agreed to the marriage, and if they, after the marriage, had acknowledged it as valid, the whole sum agreed on as dower would be demandable, if consummation of marriage, or *khilwuti suheeh*, (privacy of the parties, from which that act is presumed,) have taken place, previously to a divorce. If divorce take place previous to consummation, or *khilwuti suheeh*, only one half of that sum is exigible. The circumstance of a wife's leaving her husband's house, on account of a quarrel, which the learned in the law call *nushooz*, (a woman disobedient to her husband) only exempts the husband from the charge of her maintenance during the period of her contumacy, but will not cause a forfeiture of dower." The Senior Judge not being satisfied with this *futwa*, transmitted the question to the *Cauzee* and *Mooftee* of the Provincial Court, by *dawk*, for their opinions. The *Cauzee* delivered his opinion as follows: " Under the circumstances stated in the question, the sum of money which the defendant, being yet a minor, agreed to pay to the plaintiff as dower, is not exigible from him, for the agreement of a minor is not valid in law. But if the marriage of a minor take place with the consent of his guardians, and the dower were fixed by their order, and the marriage have become absolute by *khilwuti suheeh*, after the minor have come of age, the whole of the dower is exigible. If the marriage have not become absolute by *khilwuti suheeh*, only one half is exigible. The divorce of a minor is not valid in law." The *futwa* of the *Mooftee* is in the following terms: " In the marriage of minors, the attendance of the guardians is an indispensable condition. If then, a boy and girl, both minors, should, in the presence of witnesses, enter into the marriage contract, as their own act, and the husband should acknowledge himself indebted so many thousand rupees to the wife, and the guardians of the said minors being also present, give their consent, either at first, or afterwards; or if the minors on coming of age, confirm the agreement: in either case the marriage is valid, and the husband must pay the dower, whether a written document have been executed or not. If the guardians were not present at the marriage, and if after hearing of it they did not give their consent; and if the minors, on coming of age, do not acknowledge it as valid, the marriage is void; and divorce cannot take place, for divorce springs out of marriage; the marriage therefore being void, there can be no divorce, and the defendant, that is the husband, shall not be called on to pay the dower; for the engagements of a minor and an idiot are void."

After considering the above opinions and the evidence of the witnesses, the Senior Judge passed the following decision: " Whereas it appears from the *futwa* of the *Cauzee* of this Court, that in order to render the dower, acknowledged by a minor, exigible, it is necessary that the amount thereof should be fixed by order of his guardian, and from the *futwa* of the *Mooftee*, that the guardians of the minors should have given their consent in the

presence of the marriage assembly, or that the minors on coming of age, should acknowledge the dower; and whereas it has not been proved, that the amount of the plaintiff's dower was fixed at the time of the marriage by the guardian of the defendant, or that the defendant himself has since his coming of age, acknowledged and promised to pay the amount of the dower, it is ordered that the suit be dismissed; and that the plaintiff pay the costs." 1817:
Mussum-
maut
Kureem-
oonissa, v.
Ruhem
Ali.

The plaintiff, not being satisfied with that decree, appealed to the Sudder Dewanny Adawlut; that Court, however, (present G. Oswald), seeing no reason to disapprove of the decree of the Provincial Court, affirmed it and dismissed the appeal with costs.

GOVERNMENT, PRANKISHEN AITCH, and KISHEN 1817.
MUNGUL AITCH, Appellants,

versus

May 6th.

MUSSUMMAUT RAJ KOOMAREE, (Widow of PUNCHANUND-
GHOSE, deceased), Respondent.

THIS was an action brought, *in formd pauperis*, by Punchanund Ghose, on the 24th of December 1801, in the Zillah Court of Dacca Jelalpore, against the appellants, and Ramkishen Ghose, for the recovery of a 3 ana, 6 gunda. 3 cowries share of Tuppeh Bawkipore, Kut Sakhra, estimated to produce an annual profit of 1,101 rupees. An order passed by the revenue authorities, and confirmed by the executive Government, under the regulations which were in force before those enacted in 1793, is not liable to be set aside, or altered by the Courts since established.

The facts of the case were these: Ram Ram, the father of plaintiff, and the proprietor of the estate in dispute, having fallen in arrears, the Collector issued a summons for his appearance; the peon who had been sent to serve the summons, on his return, deposed on oath before the Collector, that Ram Ram had not only resisted the process, but also beaten him severely; a public advertisement, as required by article 12 of the revenue rules of 1787, was in consequence affixed at the head *cutcherry* of the district, and at the house of the defaulter, requiring his attendance within the period of ten days. Ram Ram did not appear within the period specified; and the peon, who had affixed the publication at his house, having deposed on oath, that Ram Ram had torn it in pieces in his presence, the Collector confiscated his estate, on the ground of this contumacious conduct: and, on the 29th of June 1790, submitted a report of the circumstance, through the Board of Revenue, for the orders of the Governor General in Council, with a recommendation, that the estate should either be sold, or made over to the other sharers. On the 16th of July 1790, an order was passed by the Governor General in Council, directing that the estate should be disposed of at public sale. Notwithstanding this order was communicated to the Collector, through the Board of Revenue, on the 21st of the same month, it appears from correspondence filed in the cause, that it was not finally executed until the 19th of May 1794, when the then Collector,

1817. under a peremptory order from the Board of Revenue, dated the 25th of the preceding month, disposed of it at public auction to the defendant Ramkishen Ghose, by whom it was subsequently sold to Frankishen Aitch and Kishen Mungul Aitch. Government, Frankishen Aitch, and Kishen Mungul Aitch, v. Mussumaut Raj Koomaree. The plaintiff admitted all the facts as above stated to be true; but alleged, that the evidence of a single peon was insufficient proof of the resistance, which led to the confiscation of the estate in 1790, and to the sale of it in 1794; and that the sale was consequently illegal. He further prayed, that the sale should be revoked; and that he should be put into possession of the estate as heir of his father.

The defendants pleaded, that as Ram Ram had never himself denied that he had been guilty of the contumacious conduct which led to the confiscation of his estate, his silence amounted to a virtual admission of the resistance; and that therefore the plea adduced by the plaintiff could not avail in his favour.

The Zillah Judge, on consideration of all the proceedings held in the cause, was of opinion, that the proof of the resistance which led to the confiscation, and ultimately to the sale of the estate, was insufficient; and that consequently both the confiscation and the sale were illegal. He accordingly passed a decree in favour of the plaintiff, directing that the sale should be set aside; that the plaintiff should be put into possession of the estate; and that the defendants should pay all the costs.

An appeal was preferred by the defendants, from the above decision, to the Provincial Court of Dacca, principally on the plea, that as the lands were confiscated by the Collector, at a period when Collectors had that power vested in them, and that as this confiscation was afterwards confirmed by the Governor General in Council, and the lands sold by an express order from the Board of Revenue, the act complained of by the plaintiff was sanctioned by all the authorities which then existed; and that the Zillah Judge was not competent to try the merits of the cause.

It appearing that authority had been granted by Government for the institution of the present suit, under section 11, regulation 3, 1793, the Provincial Court observed, that the cognizance of the respondent's claim could not be precluded by the plea adduced by the appellants, it being evident, that the intention of Government, in sanctioning the institution of the suit, was to subject the acts of the Collector to the investigation and decision of the Court; and on going into the merits of the cause, they concurred in opinion with the Zillah Judge, and dismissed the appeal with costs.

On a further appeal to the Sudder Dewanny Adawlut, the appellants still insisted on the plea adduced by them in the Provincial Court. Puchanund Ghose demised at this stage of the proceedings, and his widow Mussumaut Raj Koomaree appeared to defend the suit.

The Court of Sudder Dewanny Adawlut observed, that in article 12 of the revenue rules of 1787, which were in force in 1790, it is directed that, "if any zemindar, or proprietor of land, shall be guilty of contumacious conduct, or of disobedience to orders, and the same shall be established, the Collector shall cause a proclamation to be put up, requiring his attendance within a specified

period; and if he fail to attend within the said period, the Collector shall confiscate his estate, and transmit a report of the circumstance to the Governor General in Council, who may either order the lands to be sold, or to be let out in farm, as it may appear to him advisable, and no such proprietor shall be reinstated in the possession of his estate, unless by the express orders of the Governor General in Council;" that the estate in question had been confiscated by the Collector; and the order for the sale of it had been passed by the Governor General in Council under these rules; and that as the order for bringing the estate to sale had been passed previous to the enactment of the regulations of 1793, at a time when Government had not subjected its acts to investigation and decision in the Courts of Judicature, it could not, on any account, be set aside or altered by the Courts now established. Under these circumstances, the Court (present R. Ker and G. Oswald) did not concur in the decisions passed by the Courts below; which were therefore reversed, and a final judgment was given in favour of the appellants.

The costs in each of the Courts were adjudged against the respondent.

1817.
Government,
Prankishen
Aitch, and
Kishen
Mungul
Aitch, v.
Mussum-
maut Raj
Koomarce.

KALEEPERSHAUD ROY, DOORGA SOONDER ROY, and
others, Appellants,
versus
DEGUMBER ROY, Respondent.

1817.
May 28th.

THE family of the parties in this case, was as follows :
KISHEN DEB ROY :

Kashee Nath Roy,			Raj Chunder	Degumber
			Roy, dying	Roy,
Kalee Pershaud	Ram Soonder	Doorga Soonder	without issue,	<i>Plaintiff.</i>
Roy,	Roy,	Roy,	left his Widow	
<i>Defendant.</i>	<i>Defendant.</i>	<i>Defendant.</i>	Mussummaut	
			Gour Munnee.	

According to the Hindoo law, current in Bengal, if property be acquired without aid from joint funds, by the exclusive industry of one member of an undivided Hindoo family, others of the same family, although they were at the time living in coparcenary with him, have no right to

Degumber Roy brought this action against the defendants, in the Zillah Court of Burdwan, on the 22d of February 1808, for a moiety of an 11 ana share of mouza Gurhee, &c. situated in pergunna Benode Nuggur, and also for a moiety of lot Mustole and talook Neij Gurhee; the annual produce of the whole of which was stated at 6,209 rupees, 8 anas. It was set forth in the plaint, that the 11 ana share of mouza Gurhee, &c. situated in pergunna Benode Nuggur, was the paternal zemindaree of Kishen Deb Roy, the father of the plaintiff; that on the demise of Kishen Deb Roy, Kashee Nath Roy, the plaintiff's eldest brother, being capable of the care and management of the estate, took charge of the whole, and the rest of the family lived under him, as under their father; that on the death of Kashee Nath in the year 1204 B. S., his sons, the defendants, continued to live in family-partnership with plain-

1817. tiff, who, in 1208 B. S., purchased lot Mustole in the name of his nephew Ram Soonder Roy, and afterwards, in 1211, B. S., a *putnee talook*, named Neij Gurhee, in the name of Puncanund Sircar, his servant, with money advanced from the joint funds of the family; that his second brother, Raj Chunder Roy, died childless, and that plaintiff was therefore entitled to a moiety of the property above detailed.

participate in his acquisition. A widow, under the same law, is entitled to take her husband's share of ancestral property, which, at his death, was held by him and other sharers, as a joint undivided estate. But she has a life interest only.

The defendants pleaded a previous partition of the ancestral property, left by their grandfather, alleging that on that occasion, a talook, situated in Dacca, had fallen to the share of the plaintiff; and that their father Kashee Nath Roy, and uncle Raj Chunder Roy, had each obtained a moiety of the 11 ana share of mouza Gurhee, &c. as their share; that lot Mustole and the *putnee talook* Neij Gurhee had been purchased by Ramsoonder Roy, the former in his own name, and the latter in the name of Puncanund Sircar, his servant, with money acquired by his separate and exclusive industry, and without any aid from joint funds; and that, under these circumstances, the claim of the plaintiff was wholly inadmissible.

After the prescribed pleadings had been filed by the parties, the cause was removed, under the provisions of regulation 13, 1808, into the Provincial Court of Calcutta.

A claim was set up by Mussummaut Gour Munnee, the widow of Raj Chunder Roy, to his share of the undivided ancestral estate; but as she had not appeared originally as a party in the cause, and as her petition was not presented until the cause was in a state of preparation for decision, the Court did not deem it necessary to make an investigation into the merits of it, but left her the option of instituting a suit against both parties for the recovery of her husband's share.

It appeared to the Provincial Court, that there was sufficient proof, from the evidence of the witnesses adduced by both parties, that no partition of the ancestral estate, left by Kishen Deb Roy, had ever taken place; that the parties had lived together, as coparceners, up to the date of the institution of the suit in the Zillah Court; and that lot-Mustole and Neij Gurhee had been purchased by Ramsoonder Roy, the former in his own name, and the latter in that of his servant Puncanund Sircar, at a time when the parties were living conjointly.

The Court observed, that as the plaintiff had omitted to include Puncanund Sircar among the defendants, the claim preferred by him in the present suit to a moiety of the *putnee talook* Neij Gurhee, which had been purchased in the name of that person, was inadmissible; and that the only point remaining to be considered was, whether lot Mustole had been purchased by Ramsoonder Roy, with the produce of his separate and exclusive industry, and without aid from the joint funds of the family, or otherwise; and it not appearing to be satisfactorily established by the evidence, that Ramsoonder Roy had purchased the lands in question with the produce of his own industry, the plea set up by him was rejected by the Court, as being unworthy of credit. A decree was accordingly passed in favour of plaintiff, adjudging to him a moiety of the ancestral estate, and of lot Mustole; and

leaving him the option to institute a separate suit against Pun-
chanund Sircar and the defendants in the present suit, for a
moiety of Neij Gurhee; the costs were made chargeable to the
defendants.

1817.

Kaleeper-
shaud Roy,
Doorga
Soonder
Roy and
others, v.
Degumber
Roy.

An appeal was preferred from the above decision to the Court
of Sudder Dewanny Adawlut.

With respect to the 11 ana share of mouza Gurhee, &c. situated
in pergunna Benode Nuggur, which formed the zemindary of
Kishen Deb Roy, it appeared to the Court to be established, that,
on his death, it was held in copartnership by his sons Kashee
Nath, Raj Chunder, and the plaintiff; and on the death of Kashee
Nath and Raj Chunder, by the plaintiff, the defendants, and Mus-
summaut Gour Munnee, the widow of Raj Chunder; and that
there never had been a separation of the family. With respect to
lot Mustole and the *putnee talook* Neij Gurhee, of which a moiety
was claimed by the respondent, as having been purchased by him
in the name of Ram Soonder Roy, with money advanced from the
joint funds of the family, the Court observed, that it had been
established by the evidence, that these lands were purchased by
Ram Soonder Roy, in his own name, and in that of his servant,
at a time when he was a member of an undivided family; but that
there was no proof whatever of the fact of his having purchased
them with money advanced from the joint funds of the family;
that, on the contrary, it appears, the profits of these lands had been
enjoyed solely and exclusively by him; and that the whole evidence
went to shew, that he had purchased the said lands with his own
money. In order, therefore, to determine the law, as connected
with the circumstances of the case, the Court proposed the fol-
lowing questions to their Hindoo Law Officers:

1st, If lot Mustole and the *putnee talook* Neij Gurhee were
purchased by Ram Soonder Roy, a member of an undivided family,
with money realized by his separate and exclusive industry, with-
out aid from the joint funds of the family, will the other members
of the family be entitled to share in the said lands?

2nd, Is Mussummaut Gour Munnee, entitled to any, and what
share of the undivided ancestrel estate?

3d, Has she a legal right to a share of the property purchased
by Ram Soonder Roy, under the abovementioned circumstances?

The pundits returned the following answer:

If Ram Soonder Roy, purchased lot Mustole and the *putnee
talook* Neij Gurhee, with the produce of his exclusive and separate
industry, and without aid from the joint funds of the family, these
lands belong exclusively to him, and none of the other members
of the family have a right to participate therein. Mussummaut
Gour Munnee is entitled (during her life) (a), to a third share of
the ancestrel property, which, had her husband been alive, would
have fallen to him; but she has no right to participate in the
acquisition of Ram Soonder Roy from his separate funds.

On considering this opinion of the Pundits, the Court of Sudder
Dewanny Adawlut (present R. Ker and G. Oswald) determined,

(a) This is not specified in the *vyavastha*; but see note at the end of this
cause.

1817. that the ancestral estate of Kishen Deb Roy should be divided into three shares, whereof Mussummaut Gour Munnee, in right of succession to her husband Raj Chunder Roy, the heirs of Kashee Nath, and the respondent, Degumber Roy, should each receive one share; but that the respondent should not participate in the acquisitions of Ram Soonder Roy, from his own funds, which were declared not liable to partition among the coparceners. Final judgment was given by the Sudder Dewanny Adawlut accordingly, amending the decree passed in favour of the respondent by the Provincial Court; and directing an immediate partition to be made of the ancestral estate, according to the distribution above determined on.

Kateer-
shaud Roy,
Doorga
Soonder
Roy, and
others. v.
Degumber
Roy.

The costs were made payable by the parties respectively. (a)

1817. BABOO BIRJNATH, BABOO PUNJUB LAL, RAMPER-
SHAUD NAG, and JOOGUL KISHWUR BHOSE,
May 29th (Heirs of BABOO DOOARKA NATH), Appellants,
versus
THE COLLECTOR OF BURDWAN, Respondent.

During the time a per-
gunna belonging to Govern-
ment was held *khas*, certain lands were made free of assessment by *lakhiraj sunnuds* duly sanctioned; after this the per-
gunna was sold by auction as a zemindary, subject to a specific *jumma*; the purchaser sues Government for a deduction in his *jumma*, on account of the lands

THIS suit was instituted by Dooarka Nath, zemindar of per-
gunna Mundul Ghaut, against the Collector of Zillah Burdwan, in the Provincial Court of Calcutta, to obtain a deduction in the amount of the annual assessment of his zemindary, and to recover a certain sum of money, alleged to have been unduly levied from him by the Collector. The amount of the action was laid at 5,867 rupees, 3 anas, 5 gundas and 2 cowries.

The plaintiff stated, that he purchased pergunna Mundul Ghaut at public auction, on the 3d *Maug* 1213, B. S., and signed the same *tahood* which had been signed by the former zemindars previously to the year 1198 B. S., for 209,988 sicca rupees, 14 anas, 4 gundas, and 1 cowry; that he found on inquiry, that from the year 1199 to 1213, B. S., the estate had been held *khas* by the officers of Government; that during this period, the Collector had given *lakhiraj sunnuds* to different persons, for 665 beegas, 12 biswas of land, for the purpose of digging tanks, taking from them 10 years produce as *sulamee*, and that a deduction of 1,302 rupees had been made from the *mofussil* assets, but that no similar deduction had been allowed in the *sudder jumma*, as has always been customary; that, immediately after the sale, on finding this to be the state of the case, he presented a petition to the Board

(a) In adjudging to Gour Munnee her share of the estate, although she was not an original plaintiff in the cause, the Court appear to have been guided by the rule prescribed in section 13, regulation 3, 1793.

It has been decided in former cases, that a widow has but a life interest in the property of her husband.

Vide vol. 1, page 107, note; page 112, note; page 115, note; page 121, note; page 261; and page 359.

of Revenue and to the Collector; that the Board, deeming his claim admissible, ordered the Collector to grant a remission; that this order was communicated to the Collector on the 7th *Chey* 1214, B. S., and that in consequence thereof, the Collector allowed this remission for the years 1213 and 1214, B. S., but afterwards, on the 14th of June 1808 (2nd *Assar* 1215, B. S.), by order of the Board of Revenue, issued a *purwanna* calling on him to pay the sum of 3,087 rupees, 3 anas, 5 gundas and 2 cowries, (being 2,604 rupees, as a balance due for the years 1213 and 1214, B. S.; and 483 rupees, 3 anas, 5 gundas and 2 cowries interest thereon), and issued a proclamation for the sale of part of his zemindary, in default of payment thereof by the 10th *Bysauk* 1216, B. S.; that on the 25th *Chey* 1215, B. S., in order to save his lands, he paid the sum demanded, with the sum of 1,302 rupees for the year 1215, B. S., that notwithstanding this, the Collector on the 5th *Bysauk*, 1216, B. S., made a further demand of 176 rupees for interest, which he also paid. He therefore sued, under section 46 of regulation 14, 1793, to recover from Government the sum of 3,906 rupees, the amount leived from him in the years 1213, 1214 and 1215, B. S., with 659 rupees, 3 anas, 5 gundas and 2 cowries interest thereon, making the sum total 4,565 rupees, 3 anas, 5 gundas and 2 cowries, and to have a remission of 1,302 rupees, *per annum* from his *jumma*, on account of the deduction made in the *mofussil* assets of his zemindary by the *lakhiraj sunnuds*. He founded his claim to the remission on the circumstance that there was no mention made in the proclamation of sale, issued in the year 1213, B. S., previously to his purchase, of the *lakhiraj* land; and argued that had it been the intention of Government, that the same sum should be payable by the purchaser, as had been paid by former zemindars, notwithstanding the deduction in the *mofussil* assets, such intention would have been notified in the proclamation.

The Collector defended the suit on the part of Government. He stated that in January 1794, when pergunna Mundul Ghaut, which had been purchased by Government, was in the hands of its officers, certain lands were granted to different persons, by order of the Supreme Council, for the purpose of digging tanks; that *maafee sunnuds*, exempting them from assessment, were given with them; that it was notified in the proclamation of December 1807, that the *jumma* of the lands sold was 209,988 rupees, 14 anas, 4 gundas and 1 cowry, and that the plaintiff purchased the zemindary at that *jumma* at the public auction for 51,000 rupees; that as the deduction had been made from the *mofussil* assets so long before the sale, the plaintiff could not plead ignorance of that fact; that though the Board of Revenue had at one time authorized the remission, yet on more full consideration of the subject, they had, by order of Government, instructed the Collector to levy the arrears from the plaintiff, and to collect the full *jumma* from him in future.

The plaintiff having demised in this stage of the proceedings, the appellants, his heirs, carried on the suit.

The Provincial Court, without calling for proofs or documents from the parties, passed the following decision: "It appears

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lector of
Burdwan.

from the pleadings that the pergunna, for 15 years previously to the purchase thereof by the plaintiff, was held as the estate of Government, and that during that period, certain lands were sold to individuals free of assessment for the purpose of digging tanks, and that *lakhiraj sunnuds* were given to the purchasers; and that after this, in the year 1213, B. S., the *jumma* of the pergunna having been settled, a proclamation of sale was issued by order of the Governor General in Council; and that the plaintiff purchased the zemindary at auction, and signed the *tahood* for 209,988 rupees, 14 anas, 4 gundas and 1 cowry, the same *jumma* which was advertised in the proclamation. Under these circumstances, the claim of the plaintiff to a remission is inadmissible;" and dismissed the suit with costs.

The appellants being dissatisfied with this decision, preferred an appeal to the Sudder Dewanny Adawlut, on the plea, that the *jumma* of the estate was not fixed in the year 1213, B. S., but at the time of the decennial settlement, and that as a deduction had been made in the *mofussil* collections since that time, it was but just that a similar deduction should be made in the *sudder jumma*.

The respondent urged, that the plaintiff, having purchased the estate at public auction, after the settlement of the *jumma* in the year 1213, B. S., was not entitled to any deduction.

The Court of Sudder Dewanny Adawlut (present R. Ker and G. Oswald) held, that as the plaintiff had bought the zemindary at a *jumma* of 209,988 rupees, 14 anas, 4 gundas and 1 cowry, after the Collector had, by order of the Government, granted *lakhiraj sunnuds* for 665 beegas, 12 biswas, he was not entitled to a deduction on that account; and confirmed the decree of the Provincial Court.

1817.

June 7th.

BHOWANNY PERSHAUD CHUCKERBUTTY, and others,
Appellants,

versus

MUSSUMMAUT COROONA MYE, (Widow of RAJA DOORGA
KONWUR NURAIN, deceased), and others, Respondents.

The power of altering the public assessment is not vested by the regulations in the Civil Courts of judicature; but is reserved exclusively to the Governor General in Council.

THE appellants, the original defendants in this case, were proprietors of a talook, which in the year 1789, was separated from the zemindaree of Raja Doorga Koonwur Nurain, the plaintiff, and at the period of the decennial settlement was registered in the Collector's office in the name of Chunder Goput Chuckerbutty, as an independent talook, assessable with an annual *jumma* of 702 rupees. The allegation of the plaintiff was, that the defendants, Bhowanny Pershaud Chuckerbutty and Ramdoolub, did not possess any proprietary right in the talook, which entitled them to separation from his zemindaree; that previous to its separation, the *jumma* thereof was variable, and was raised in 1198, B. S. to 2,418 rupees, 12 anas; and that the defendants, in 1199, B. S., in

collusion with the ministerial officers of the Collector, procured the separation of the talook from his zemindary at an under-rated assessment of 702 rupees, thereby occasioning an undue enhancement of the *jumma* assessed upon the remaining lands of his zemindary. The plaintiff concluded by praying that the talook of the defendants should be subjected to an increase of assessment, amounting to 1,716 rupees, 12 anas; and that a proportionate abatement of the *jumma* fixed on his zemindary should be allowed.

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The defendants, in answer, stated, that their talook was of a proprietary nature, such as to entitle them, under the regulations of Government, to separation from the zemindaree of the plaintiff; that in the year 1789, it was accordingly separated from his zemindaree, and the *jumma* thereof adjusted by the Collector, in the presence of the plaintiff's *gomashtha*, after a due consideration of such accounts and papers as were requisite for that purpose; that they then entered into engagements direct with Government, and that, under the regulations, no demand could be made upon them for an augmentation of the public assessment.

Ramdoolub, one of the defendants, demised at this stage of the proceedings, and Mussummaut Sidhesree and others, his heirs, appeared to defend the suit.

It appearing to the Zillah Judge to be clearly established by the evidence adduced by both parties, that the talook of the defendants had been liable to a variable *jumma* previous to 1199, B. S., and that in 1198, B. S. it had been raised by the plaintiff to the amount of 2,418 rupees, 12 anas, he was of opinion, that the talook in question was not such as to entitle the defendants to separation from the zemindary of the plaintiff; and that the order passed by the Collector, on the 27th of May 1789, for the separation of the said talook, at an under-rated assessment of 702 rupees, was improper. Under these circumstances he passed a decree in favour of the plaintiff, directing that the talook in question should be subjected to an increase of *jumma*, amounting to 1,716 rupees, 12 anas, which should be paid by the defendants into the zemindar's *cutcherry*; and that the plaintiff should recover from the defendants the whole amount of *jumma*, which had been withheld from him since the separation of their talook from his zemindaree in 1179, B. S. The costs were made chargeable to the defendants.

After an appeal had been preferred by the defendants from the above decision to the Provincial Court of Dacca, Doorga Koonwur Narain demising, his widow, Coroona Mye, and Panioti Alexander and others, auction purchasers of his zemindary, defended the appeal.

The Judges of the Provincial Court all differed in opinion. The Second Judge (Sir R. Dick), was of opinion, that the Courts of civil judicature were not authorized to alter the assessment of estates, and that this power was vested exclusively in the revenue authorities. He therefore thought that the Zillah decree should be revised. The Third Judge (Mr. J. M. Rees) did not agree in this opinion. He considered it to be fully established by the evidence (oral and written), that the *jumma* of the talook in question had been variable previously to the separation thereof from the estate of the respondent: and that the talook was not

1817. of such a nature as to entitle the appellants to claim a separation thereof from the respondent's zemindaree, and that the respondent was entitled, under section 12, regulation 7, 1793, to a re-union of the talook, to this estate, but that no such order could be passed in the present case, as the plaintiff had not claimed it in his original plaint. He accordingly declared his judgment, that the decision of the Zillah Judge which fixed the amount of the *jumma* to be added to that of the appellant should be reversed; and that the Collector should be ordered to re-assess the talook in question in the mode prescribed by the regulations in force, deducting from the *jumma* of the respondents the additional sum to which the talook of the appellant should be subjected. The case came on finally before the Officiating Senior Judge (Mr. Y. Burges). He was also of opinion that there was ample proof that the talook had been held at a variable *jumma* previously to the separation in A. D. 1789; and that the tenure thereof was not such as to entitle the appellants to a separation. He concurred with the Zillah Judge as to the amount of the annual *jumma* to be deducted from the *jumma* of the respondents, and to be added to that of the appellants; and as he differed in opinion from the Second and Third Judges, he, under the provisions of section 7, regulation 3, 1797, (which gave him, as Senior Judge, a casting voice) passed a final judgment on the 20th of July 1813, confirming the decree of the Zillah Judge, and dismissing the appeal with costs.

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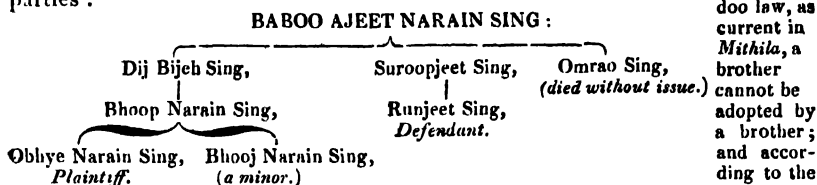
On further appeal from the above decision to the Court of Sudder Dewanny Adawlut, that Court (present R. Ker and G. Oswald), did not concur in it. The Court observed, that the claim preferred by the plaintiff, Raja Doorga Koonwur Narain, was solely and expressly to obtain an alteration of the public assessment fixed on the talook of the defendants at the decennial settlement; that the power of altering the assessment, fixed by Government on any estate, was not vested by the regulations in the Courts of judicature, but was reserved exclusively to the Governor General in Council; and that consequently the claim of the plaintiff in this suit was inadmissible. Judgment was accordingly passed by the Sudder Dewanny Adawlut, reversing the decrees of the lower Courts, with costs payable by the parties respectively.

BABOO RUNJEET SING, Appellant,
versus
 BABOO OBHYE NARAIN SING, Respondent.

1817.

July 26th.

THE following is a genealogical sketch of the family of the parties :



According to the Hindoo law, as current in Mithila, a brother cannot be adopted by a brother; and according to the same system of law, a childless Hindoo widow will not succeed to her husband's share of a joint undivided estate, if he have any brothers living.

This suit was instituted, (first in the Zillah Court of Tirhoot, but removed, under regulation 13, 1808, to the Provincial Court of Patna), by the respondent, in behalf of himself and a minor brother, to recover possession of a moiety of talook Keshoo Narainpoor, &c. an ancestrel estate. The plaintiff set forth, that on the death of Baboo Ajeet Narain Sing, his three sons succeeded to his estate, as members of a joint undivided family, and one of them, Omrao Sing, dying without issue, his share devolved on his two brothers; that the estate was managed by Dij Bijeh Sing, the eldest son, and after his death, the second son, Suroopjeet Sing, the father of Runjeet Sing the defendant, and the defendant himself, had successively managed it; that they had, from time to time, paid a part of the profits to the plaintiff and his father, for their maintenance; but that on the defendants refusing to give up possession of their share, a petition was presented to the Collector, by the plaintiff, praying that his name and the name of his brother might be entered as proprietors of a moiety of the estate; that the Collector having informed him that he must first prove his title to the same by a civil action, he had instituted this suit for that purpose.

The defendant, in reply, acknowledged that the family was undivided, but denied that the plaintiff had any claim to any part of the estate in question. He stated that Dij Bijeh Sing had large sums of money in his hands, the joint property of the family; that when the brothers wanted him to share it among them, he gave up his share of the estate in question, but conditioned that his name should be continued as proprietor till his death, and that the females of his family should be supported during their lives; that his son Bhoop Narain, father of the plaintiff, also executed a deed confirming the one executed by his father. With regard to the third share, that of Omrao Sing, he stated, that he, before his death, appointed Suroopjeet (defendant's father) his *kurta pootra*, and gave him up all his property. He moreover claimed that share under a deed, executed by the widow of Omrao Sing, whereby she relinquished her share of her husband's property to him (the defendant), on receiving 700 rupees for her maintenance.

The Provincial Court did not consider the relinquishment of their share by Dij Bijeh Sing and Bhoop Narain at all established; and having doubts as to the legality of the alleged adoption, and

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the validity of the deed executed in favour of the defendant by the widow of Omrao Sing, proposed the following questions to their Hindoo law officer:

1st, Is the appointment of a *kurta pootra* valid without written deeds?

2nd, Is the adoption of an elder brother by a younger brother valid?

3d, Ancestral property being in the possession of three brothers, one dies leaving a widow: who will succeed to his share? his widow, or his brothers?

The Pundit gave the following answers:

1st, The appointment of a *kurta pootra* is not invalid from no written documents having been entered into, though it were better that such had been written.

2d, An elder brother cannot be the *kurta pootra* of a younger brother: for it is written in the *Duttuca Mimansa*, according to the doctrine of *Sounaca*, that an elder brother, an uncle, &c. cannot become a son.

3d, In case of undivided property, if the deceased left no issue, the brothers, and not the widow, will succeed to his share. This is according to the doctrine of *Narud Mune*, as entered in the *Mitakshura* and other tracts.

At the request of the *vakeel* of the defendant, a fourth question was put to the pundit: Whether an elder brother might not be adopted, if there were no younger brother? To this he replied, that, according to the doctrine of *Boudhayana*, as stated in the *Ushtumbeh*, an elder brother cannot be adopted. The Court, on considering the answers of the law officer, and the evidence adduced, were of opinion, that the claim of the defendant to the whole share of Omrao Sing was unfounded, either on the plea of gift, or adoption; and that the deed of gift executed in his favour by the widow of Omrao Sing was invalid, she having no right to the share of her deceased husband. A decree was accordingly passed in favour of the plaintiff, directing that he should be put in possession of a moiety of the estate in question.

An appeal having been preferred by the defendant to the Sudder Dewanny Adawlut, that Court (present R. Ker and G. Oswald,) confirmed the decree of the Provincial Court, and dismissed the appeal with costs. (a)

(a) In the *Duttuca Mimansa* of *Nunda Pundita*, (translated by Mr. Sutherland,) in section 5, which treats of the mode of adoption, according to the text of *Sounaca*, it is thus laid down: "Let the adopter, having performed various ceremonies, and having adorned with clothes and so forth, the boy, bearing the reflection of a son, &c." The term "reflection of a son" is explained by the Commentator to mean the resemblance of a son, that is the capability to have sprung from the adopter himself, through an appointment, (to raise issue on another's wife,) or that the boy to be adopted be one, who, by a legal marriage of his mother, might have been the legitimate son of the adopter. It is added, "accordingly, the brother, paternal and maternal uncles, the daughter's son, and that of a sister, are excluded; for they bear not the resemblance of a son." *Duttuca Mimansa*, section 5, para. 15 to 17 inclusive.—page 90.

NUB KOOMAR CHOWDRY, and RAM KOOMAR
CHOWDRY, Appellants,

versus

JYE DEO NUNDEE, and others, Respondents.

1817.

Aug. 14th.

THIS suit was instituted in the Zillah Court of Burdwan, on the 7th of January 1807, by Thakoor Doss Nundee, to recover from the appellants and others the sum of sicca rupees 2,440, being the principal and interest of a bond.

The plaintiff set forth, that Anund Chund Chowdry, Raj Koomar Chowdry, Ram Koomar Chowdry, and Nub Koomar Chowdry, were brothers, and lived as members of a joint undivided family; that Anund Chund used to manage the family estate at the *sudder zeminduree cutcherry*, and after his death, Raj Koomar acted as manager for the rest; that on the 27th *Phagoon* 1211, B. S., he borrowed 2,000 rupees from the plaintiff for the use of the family, and executed a bond, bearing interest at one *per cent* per month; and that the family is still undivided, and that Raj Koomar also is dead. He therefore sued Bulram, the son of Anund Chund, and the widow of Raj Koomar, (who were the heirs of those two persons,) and Ram Koomar and Nub Koomar, in order to recover the principal of the sum lent with the interest due thereon.

The widow of Raj Koomar said that she knew nothing about the debt. The other defendants denied their liability to the debts contracted by Raj Koomar, stating that the four brothers had separated in the year 1203, B. S., and divided the family property among themselves.

The plaintiff filed the bond, and produced evidence in proof of its execution, and of the payment of the money; as well as that the family of the defendants was undivided. The defendants brought witnesses to prove that the brothers were not in family partnership. The Zillah Judge was of opinion that it was clearly established by the evidence before him, that Raj Koomar did borrow the money, and execute the bond, as stated by the plaintiff; and that the sum so borrowed was applied to the use of the family, he being at the time manager of all the concerns thereof. He therefore decreed that the defendants should pay the principal sum borrowed, with interest thereon, from the date of the bond up to the date on which his decree was passed.

Nub Koomar Chowdry, Ram Koomar Chowdry and Bulram appealed from this decision to the Provincial Court of Calcutta, where the appeal was defended by Jye Deo Nundee, Jug Mohun Nundee and Kalee Doss Nundee, heirs of Thakoor Doss Nundee, who had demised.

The Provincial Court, not being satisfied with the evidence produced in the Zillah Court, desired the Zillah Judge to take further proof, as to the family being undivided, or not, and directed that enquiry should be made, through the Collector, in whose name certain *mehals*, stated to be the property of the family, were registered. The Collector reported that the name of Nub Koomar had been entered in the books of his office as proprietor of lot Kaadpoor, &c. 28 villages in pergunna Ameerabad, ever since 1210

The appellants were adjudged by the Provincial Court to pay a debt borrowed by their brother, on the ground of the family having been undivided, and of the money borrowed having been applied for the benefit of the family generally; but the decree allowed them, at the same time to sue for the recovery of the sum so adjudged from the estate of their brother. A special appeal was admitted against this part of the decree, as inconsistent, and so much of the decree as gave this option was annulled by the Court of Sudder Dewanny Adawlut.

1817.

Nub Koomar Chowdry and Ram Koomar Chowdry, v. Jye Deo Nundee and others. B. S.; and the name of Ram Koomar, was entered as proprietor of lot Nurain Patti, containing 13 villages; but that he had no means of ascertaining what other persons might be sharers in these *mehals*. On consideration of the proceedings of the Zillah Judge, and the further evidence taken by order of the Court, the Senior Judge (J. Wintle) passed a decree confirming the decision of the Zillah Court, and directing that the respondent should recover the amount of the debt from the appellants and the widow of Raj Koomar Chowdry; but added, that if the appellants had any claim to recover that sum from the estate of Raj Koomar Chowdry, they were at liberty to sue his heirs for the same.

Nub Koomar Chowdry and Ram Koomar Chowdry being still dissatisfied with the foregoing decrees, presented a petition to the Court of Sudder Dewanny Adawlut, praying for the admission of a special appeal, on the following pleas: 1st, That the bond specified that Raj Koomar received the sum borrowed in gold mohurs, and the witness, through whom it is said to have been delivered, stated that the money was paid in rupees; 2d, That it was proved by the evidence of the witnesses that the four brothers had separated, and divided the family property in 1203, B. S.; 3d, That it was clearly established by the report of the Collector, that they (the appellants) had separately purchased certain *mehals* which they still held in their own names respectively; 4th, That none of the witnesses had stated that Raj Koomar borrowed the money while the family was undivided, or that the money was expended for the mutual advantage of the family; 5th, That the decree of the Provincial Court declared that it was proved that the family was undivided, but left them the option of recovering the amount payable to the respondents from the estate of Raj Koomar; this permission to prosecute they pleaded as a proof that the family was divided, as it could not have been given, but on proof that the family partnership was dissolved at the time this transaction took place.

The Court of Sudder Dewanny Adawlut admitted a special appeal, for the purpose of determining whether the order passed by the Provincial Court, granting permission to the petitioners to institute a fresh suit against the heirs of Raj Koomar, was just and proper, or otherwise.

When the suit came to a final hearing in the Court of Sudder Dewanny Adawlut, the appellants brought forward no further pleas, than those adduced in their first petition for the admission of a special appeal.

The respondents (after premising that the fact of the debt having been incurred could not be disputed), replied to the first plea that the validity of the bond was by no means affected by the circumstance of its specifying one description of coin, and the witness (through whom the money was delivered) deposing that it was paid in another description of coin. With respect to the second plea, of the separation having taken place in 1203, B. S., the respondents alleged, that had the separation taken place there would have been a formal partition of the property, real and personal, and the deed of partition would have been registered in the Zillah Court. In reply to the third plea, they observed, that the report of the Collector, stating that certain villages were

separately entered in his books in the names of the appellants (from which they wished to establish the inference of their being separated from the rest of the family), could not avail them, inasmuch as it was a well known fact, that lands are frequently registered in the Collector's office, as being the property of one individual, although he may have many partners in that property, of whom the Collector has never heard. In answer to the remaining pleas, they observed generally, that the money had been borrowed by Raj Koomar, and applied by him to the use of the joint family, of which the appellants were, at the time of contracting the debt, and still are, members.

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Nub Koomar Chowdry and Ram Koomar Chowdry, v. Jye Deo Nundee and others.

On the 14th of August 1817, the case was finally decided. The Court (present R. Ker and G. Oswald), saw no reason for reversing that part of the decree of the Provincial Court which affirmed the decree of the Zillah Court in favour of the plaintiff, and therefore finally confirmed that decree; but they annulled so much of the decree of the Provincial Court, as gave the appellants an option of recovering the amount of the sum decreed against them, from the estate of Raj Koomar.

PERTAUB DEB, Appellant,

1818.

versus

SU RRUP DEB RAIKUT, (a Minor, through JUMBEUT LAL, his Guardian), Respondent. Jan. 19th.

THIS suit was instituted on the 19th of June 1811, in the Provincial Court of Moorshedabad, by the appellant, in order to recover from the respondent possession of the zemindary of pergunnah Bykuntpoor, and the title of *Raikut*. Suit laid at 46,431 rupees.

The plaint set forth, that according to the custom of the family of the zemindars of Bykuntpoor, the person in possession of the estate is called *Raikut*, and that after his death, the estate and title of *Raikut* go to the next eldest brother, who, during the lifetime of the *Raikut*, has the *Muhal chooreh bundhara* assigned to him for his maintenance; that in the event of there being no surviving brother, the eldest son of the late incumbent succeeds to the estate and title: that on the death of Dhurum Deb *Raikut*, he, having no brothers, was succeeded by his son Bhurut Deb *Raikut*, the oldest of six brothers; that on the death of Bhurut Deb he was succeeded by the third brother Dhurup Deb *Raikut*, the second having died in the interim; that Dhurup Deb having survived all his brothers, was succeeded by his son Jantee Deb *Raikut*, the brother of the plaintiff; that he, on his death-bed, appointed the plaintiff his successor, and died on the 8th Bysakh 1207, B. S.; that after he (plaintiff) had assumed the title and taken the estate, he sent Ramanund Chukerbutty with a petition to the Collector, praying that a *purwanna* might be issued confirming him in the zemindary; that Ramanund did not present the

Claim by appellant to an estate on plea of family usage, whereby a brother succeeds a brother, to the prejudice of surviving sons, disallowed, on proof that such was not the family usage.

1818. petition sent by him (the plaintiff), but forged other petitions, stating that Surrup Deb, the son of the deceased zemindar, was legal successor to his father, and got himself appointed *serberakar* of the estate of the defendant, then a minor; that on hearing this he (plaintiff) applied to the Collector to have his own name entered in the records as zemindar, but the Collector informed him that the orders passed in this case could only be reversed by a regular civil suit. The plaintiff further stated that the Court of Wards having removed the *serberakar*, ordered that the estate should be let in farm; and that to prevent a stranger from getting a footing in the estate, and to protect it from injury, he had consented to take the farm thereof, but contended that this could not be construed into an acknowledgment, on his part, of the right of the defendant to hold the estate as zemindar.

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Raikut.

The defendant, by his guardian, denied that the family custom was as stated by the plaintiff, and pleaded that the estate had always descended from father to son, as was the general custom among the Hindoos. He stated that when Jantee Deb, his father, was on his death-bed, he appointed the plaintiff his (defendant's) guardian, and after causing a petition to be written to this effect to the Collector, died; that the plaintiff immediately installed him as *Raikut*, and sent petitions to the Collector, praying that he might be confirmed as *Raikut* and zemindar, and that he himself might be appointed *serberakar*; that the plaintiff was appointed guardian of his person, and Ramanund Chukerbutty *serberakar* to manage the estate: that when the estate was farmed by order of the Court of Wards, the plaintiff took the farm thereof, and had frequently designated him as zemindar and *Raikut*, in petitions presented to the Collector and other public documents.

The plaintiff did not produce any documents in support of his claim. The defendant filed a number of petitions presented by the plaintiff, at different times, to the Collector, and other documents executed by him (plaintiff) wherein he styled the defendant *Raikut* and zemindar of Bykuntpoor. The Provincial Court of Moorsshedabad, on considering all the circumstances and evidence in the case, were of opinion, that it was clearly proved, that on the death of the father of the defendant, the plaintiff sent a petition to the Collector, praying that the defendant might be confirmed as *Raikut*, and that he himself might be appointed *serberakar*: that he took the estate in farm, first for five, and again for six years, and that he designated the defendant zemindar in the engagements (*kuboolcuts*), and in a paper called the *tahood melanee*, filed by him in the Collector's office, by order of the Collector. For these and other reasons detailed in their decree, the Court considered the right of the defendant clearly established, and accordingly dismissed the suit of the plaintiff with costs.

The plaintiff was not satisfied with this decision, but preferred an appeal to the Court of Sudder Dewanny Adawlut, on the plea that his witnesses had not been examined, or his documents received. The appeal being admitted, the respondent resisted the claim on the same grounds as he had brought forward in the Provincial Court. The appellant filed a *koorseenama*, or genealogical table, and other documents in support of his claim. The Court,

observing that the point at issue was the family custom, and that this point had not been entered on, directed that the parties should name their witnesses to prove that point. The names of the witnesses having been given in, the papers were sent to the Judge of Zillah Rungpoor, in which district the contested estate is situate, with orders to examine the witnesses, in presence of the parties, or their constituted attornies, and report the result to the Court. That officer having examined the witnesses, transmitted their depositions, together with his proceedings, to the Court. The following statement is extracted from the evidence and proceedings above mentioned:

1818:

Pertanb
Deb, v.
Sarrup Deb
Raikut.

Mahadeb, the ancestor of the family, had two sons, Shishoo Sing and Beesoo Sing, Shishoo Sing the eldest, became *Raikut* of Bykuntpoor, and his sons took the cognomen of *Deo* or *Deb*. The second son became *Raja* of Cooch Behar, and his sons assumed the cognomen of *Nurain*.

From Shishoo Sing to Jantee Deb, the father of respondent (both inclusive), twelve persons successively had possession of the estate; the first, second, third and fourth each succeeding his father. The fourth, Sheeb Deb, it is ascertained, left behind him a son, named Rutun Sing. The witnesses of the respondent depose that he was not born in wedlock, being the son of a *kuneez*, or slave-girl; the witnesses of the appellant could not say whether he was a legitimate son, or the son of a *kuneez*; but both agree that the son of a *kuneez* could not succeed as *Raikut*. It is moreover proved, that the legitimate sons of the family invariably bore the cognomen of *Deb*. This, combined with the evidence of respondent's witnesses, affords strong grounds for the presumption that he was illegitimate. Sheeb Deb was succeeded (5) by his brother Muhee Deb, who was succeeded (6) by his son Bhooj Deb, who was succeeded (7) by his nephew Bishen Deb. It is ascertained that Bishen Deb, at his death, had three sons: viz. Mukoond Deb, Bhyroo Deb and Kaunt Deb, notwithstanding which his brother, Dhurum Deb, became (8) *Raikut*. The witnesses for the respondent depose, that on the death of Bishen Deb, Dhurum Deb took forcible possession of the estate, and that on this Mukoond Deb took up arms to oppose him; but that Dhurum Deb, having contrived to get him into his power, put him to death, and that on hearing of this, Bhyroo Deb drowned himself, and Kaunt Deb fled, and has never since been heard of. Some of the witnesses for the appellant confirm the murder of Mukoond Deb, and the drowning of Bhyroo Deb, but do not agree with regard to the fate of Kaunt Deb. Dhurum Deb was succeeded (9) by his son Bhoop Deb. He died leaving no son, but a son was born to him after his death. The child however not being born during the life-time of Bhoop Deb; Bikram Deb, the brother of the deceased, became (10) *Raikut*. On his death he was succeeded (11) by his brother Dhurup Deb. The appellant's witnesses depose that he was survived by a son, named Bhoop Deb, who they say, was born of the daughter of one Benode Sirdar, after the marriage of Bikram Deb with his mother, but they are unable to state how long after the marriage he was born. The witnesses for the respondent state, that the daughter of Benode Sirdar was brought to the house of Bikram Deb in a state.

1818. of pregnancy, and that Bloop Deb was born five or six months after; so that it is doubtful whether he was a legitimate son of Bikram Deb, or not. However this might be, the witnesses depose that when Dhurup Deb took the estate, he was but nine or ten years old, and could not have enforced his rights, even if he had any, against his powerful opponent. Dhurup Deb was succeeded (12) by Jantee Deb, the father of the respondent. Thus there appears to have been seven instances of the son succeeding his father, and but three of the brother succeeding to a brother to the prejudice of surviving sons. In the first instance, it may be presumed that the son was illegitimate; in the second, that the brother seized the estate by force, and maintained possession thereof by violence; and in the third, the legitimacy of the son appears doubtful; besides which, he was very young, and consequently unable to maintain his rights. It appears that in the family of the Raja of Cooch Behar, (which is descended from the same common ancestor with the Bykuntpoor family), the same usage obtains, as is general among the Hindoos: viz. that a son succeeds to his father's estate. The appellant, moreover, was unable to shew by whom the custom alleged by him, so contrary to the *Shaster*, was introduced into the family; at what time, and for what reasons.

Pertaub
Deb, v.
Surrup Deb
Raikut.

The Judge of the Sudder Dewanny Adawlut (R. Ker), who tried this case, on weighing attentively the whole of the proceedings, observed that the only instance adduced of a brother succeeding to a brother, to the prejudice of a surviving son capable of succeeding, (the evidence fully warranting the presumption of the illegitimacy of the sons in the other two instances quoted) was one, in which the brother seized on and maintained his title to the estate by violence, and could not consequently be quoted as authority for upholding the custom on which the appellant founded his claim: that the right of the respondent to the estate was clearly established, both by the family usage, and by the consent of the appellant; and that the facts of the appellant having undertaken the guardianship of the respondent, his having taken the estate in farm, and designated the respondent as zemindar in the *kubouleuts* and the *tahood melanee*, were convincing proofs of his admission of the title of the respondent. A final order was therefore passed, maintaining the respondent's right to the estate, dismissing the appeal, and making the costs of both Courts payable by the appellant.

MUSSUMMAUT SEETUL BHAO, (WIDOW OF DOARKA
Doss, deceased), Appellant,

1818.

versus

Feb. 28th.

EMAUM KHAN, AND MOOHUMMUDEE KHAN,
Respondents.

THIS action was originally brought by Laljee Mull, *Gomashta* The principal of the banking-house of Gopal Doss and Doarka Doss at Furruckabad, in the Zillah Court of Furruckabad, to recover from the respondents the sum of 5,148 rupees, principal and interest due on a bond.

The plaintiff set forth, that the defendants, having borrowed the sum of 2,574 rupees from the house of Gopal Doss and Doarka Doss, executed a bond for that sum on the 5th of *Rubbee ool uwul* 1211, *Hijeree* (8th of September 1796), in favour of Deokynundun, who was at the time head *gomashta* of the firm; that Deokynundun having died, he, Laljee Mull, was appointed *gomashta*, and instituted this suit to recover from the defendants, who had refused to pay the debt, the sum of 2,574 rupees principal, and a like sum for interest; the interest at the legal rate having exceeded the principal.

The defendants pleaded that they were not answerable for the debt, as the money was borrowed by the order, and for the use of the Nuwab of Furruckabad, whose servants they were at the time.

The plaintiff, in proof of the debt, filed the bond, together with the books of the firm, wherein the transaction was entered, and brought one witness to prove the execution of the bond. The defendants filed a *muhzur nama* (or declaratory deed), wherein they stated that they were servants of the Nuwab of Furruckabad, and that they were in the habits of borrowing money for his use, and called publicly upon any respectable persons, who were acquainted with the circumstances, to come forward, and affix their signatures to the deed in attestation of the truth of the facts therein alleged. This deed was written on stamp paper, and bore 19 signatures.

At this stage of the proceedings the case was transferred, under the provisions of regulation 13, 1808, to the Provincial Court of Bareilly. The case having come to a hearing on the 17th of September 1810, the Judges of the Court nonsuited the plaintiff, because he had sued without having obtained a *mokhtarnama* from the members of the firm of Gopal Doss and Doarka Doss.

Laljee Mull having procured a *mokhtarnama* from Mussummaut Seetul Bhao, widow of Doarka Doss deceased, who was said to have been sole proprietor of the firm, instituted a fresh suit on the 10th of April 1811, when the plaint was in substance the same as that originally filed in the Zillah Court. The defendants, in addition to the plea adduced by them in the Zillah Court, denied the execution of the bond, and pleaded, that as the bond was said to have been executed in favour of Deokynundun, he, or his legal representatives, were the only persons who were authorized to sue thereon.

On a perusal of all the proceedings of the case, the Court was of opinion that this action ought to have been brought by Deoky-

1818.

Mussum-
maut Seet-
tul Bhao,
v Emaum
Khan and
Mookum-
madee
Khan.

nundun, or by his legal representatives, as it was not proved, whether he lent the money to the defendants from his own funds, or from the funds of his employers, viz. the firm of Gopal Doss and Doarka Doss; that at all events, Laljee Mull had no right to maintain the suit, there being no proof that Mussummaut Seetul Bhao was the widow of Doarka Doss, and proprietor of the firm in question. For these and other reasons detailed in their decree, the Court dismissed the suit on the 24th of March 1813, with costs payable by the plaintiff.

Laljee Mull, being dissatisfied with this decision, preferred an appeal to the Court of Sudder Dewanny Adawlut. Previously to the admission of the appeal, Seetul Bhao presented a petition to the Court, stating that she had discharged Laljee Mull from her service, and prayed to be allowed to carry on the appeal in her own name. Her prayer was granted. The pleadings on both sides were similar to those filed in the Provincial Court.

The Court (present J. Fendall and G. Oswald) were of opinion that there was no reason to doubt the validity of the bond, as the respondents, in their answer to the original plaint filed before the Zillah Judge, acknowledged the execution thereof; and that it was fully proved, both by the confession of the respondents, and the evidence of the witnesses, that Deokynundun was, at the time this transaction took place, head *gomashita* of the banking-house of Gopal Doss and Doarka Doss; and that the money lent was taken from the funds of that house. It was also established beyond all doubt, from the records of certain cases previously decided by the Court, that the appellant was the widow of Doarka Doss, former owner of the banking-house, and that she was authorized to sue for the debts due to the house. They therefore, on the 28th of February 1818, set aside the decision of the Provincial Court, and adjudged that the appellant should obtain from the respondents, in execution of their decree, the sum of 5,178 rupees, being the principal and interest claimed on the bond. The whole of the costs were made payable by the respondents.

SYUD KHADIM ULLEE, Appellant,

1813.

versus

DULJEET SING and BHOLA DUTT, Respondents.

Mar. 16th.

THIS was an action brought by the appellant in the Zillah Court of Tirhoot, on the 4th of July 1806, to recover from the respondents possession of mouza Rusoolnugur (called also Uttoo Manikpoor), an *usillee nizamut mehal* situated in pergunna Sureysur, sikkar Hajeepoor. The plaintiff set forth, that the village in question was formerly the hereditary estate of Duljeet Sing; that he, having borrowed from the plaintiff the sum of 2,081 rupees, executed, through the agency of Bhola Dutt, his son, a deed of mortgage and conditional sale for the said village, dated the 19th of June 1801 (21st of the second *Jeyt*, 1208, F. S.), redeemable on or before the 21st *Jeyt* 1213, F. S., a period of five years, and a *kubzoolwusool*, or receipt for the said sum; and that both these deeds were registered in the registry office of the Zillah, Bhola Dutt appearing in person before the register to authenticate them: that as the period allowed for redemption had elapsed, and the sum lent had not been repaid, the plaintiff instituted this suit to obtain possession of the estate, as conclusively transferred under the deed of conditional sale.

The defendants acknowledged the execution of the *kubala* and *kubzoolwusool*, but resisted the claim of the plaintiff to possession of the village, on the plea that they had only received from him the sum of 1,300 rupees, and that on being pressed to pay the balance of the sum entered in the bond, he declined doing so, but promised to give up the deeds on their repaying him the actual sum lent: that they frequently tendered payment of the said sum, but that he, on plea of interest, refused to give up the deeds, and that they, on their part, declined paying the money till the deeds were given up. They stated that they were willing to pay the sum received by them, and contended that the tender thereof by them, previously to the expiration of the period allowed for redemption, was sufficient to bar the plaintiff's claim to possession.

The Zillah Judge did not think it necessary to hear the evidence of the witnesses of the defendants in support of the pleas urged by them. He considered that the attestation on oath of Bhola Dutt to the authenticity of the *kubala* and *kubzoolwusool* before the register (when these deeds were registered), was sufficient proof of the payment of the whole sum stated by the plaintiff to have been lent by him to the defendants. He was of opinion that the defendants were not entitled to redeem the property, as their offer to pay 1,300 rupees was not sufficient; and that to have reserved that right to themselves, they should have tendered, and in case the plaintiff refused to receive it, should have deposited in Court, the sum of 2,081 rupees. He therefore passed a decision in favour of the plaintiff, directing that he should be put in possession of the village.

The defendants, being dissatisfied, preferred an appeal, *in forma pauperis*, to the Provincial Court of Patna, on the same pleas as they had urged before the Zillah Judge. The Provincial Court

(a Moosulmaun,) sued B for possession of a village under a deed of mortgage and conditional sale for 2,081 rupees, redeemable in five years. It appearing that A lent to B only 1,300 rupees, and to avoid the imputation of taking interest, consolidated the interest on that sum for five years with the principal, and caused the aggregate sum to be entered in the bond, as principal: adjudged that he is not entitled to possession of the village, at the expiration of the period of redemption. The Court however ordered that he should recover the principal sum actually lent, with

1818. previously to passing final orders on the appeal, directed the Zillah Judge to take the depositions on oath of the witnesses to the *kubala* and *kubzoolwusool*.

interest thereon, as there was no attempt to obtain usurious interest beyond the legal rate.

The cause having come to a final hearing, the Court were of opinion, that it was proved by the evidence of the witnesses, that the plaintiff paid to the defendants the sum of 1,300 rupees, and that, being a Moosulmaun, whose religion forbade his taking interest, he had caused the defendants to consolidate with the principal the sum of 781 rupees, (which is the interest of 1,300 rupees at 12 *per cent per annum* for five years,) and enter the whole sum of 2,081 rupees in the *kubala*, as the principal sum lent; they considered that he had thereby forfeited his right to interest, and that he was not, under such a deed, entitled to possession of the village. They therefore reversed the Zillah decree, and directed that whenever the defendants should pay into Court the sum of 1,300 rupees, with interest from the date of their decree up to the date of payment, they should regain possession of the village, possession of which had been given to the plaintiff under the decree of the Zillah Court.

The appellant having petitioned the Court of Sudder Dewanny Adawlut for the admission of a special appeal, the Court admitted the appeal for the purpose of considering the question of interest involved in the decision of the Provincial Court. On the ultimate trial of the case, the Court of Sudder Dewanny Adawlut (present R. Ker and G. Oswald) concurred with the Provincial Court as far as related to the rejection of the appellant's claim of possession of the village, but did not consider his right to interest upon the loan barred by the transaction, as there was no attempt to obtain usurious interest beyond the legal rate of 12 *per cent*. They therefore passed a final judgment, directing that the respondents should repay to the appellant the sum of 1,300 rupees as principal, with a like sum as interest (the accumulation of interest at this time having exceeded the principal), and that the appellant should account for the produce of the village for the period during which he held possession under the Zillah decree, and repay to the respondents the mesne profits with interest thereon, at the rate of twelve *per cent per annum*.

MUSSUMMAUT RUBBEE KOOR, Appellant,

1818.

versus

JEWUT RAM, Respondent.

April 1st.

THIS suit was instituted in the Provincial Court of Benares, on the 5th of March 1811, *in formâ pauperis*, by the appellant, a Hindoo woman who had embraced the Moohummudan faith, to recover from the respondent, her husband, and others, possession of a house situated in the city of Benares, and other property, valued at 5,382 rupees.

She stated in her plaint, that the house, valued at 4,000 rupees, and gold and silver ornaments, to the value of 1,382 rupees, had devolved on her, at the death of her father and mother, and that she having from conviction, and of her own free will, embraced the Moohummudan faith, her husband, in league with other persons, had sold the gold and silver ornaments in order to defraud her, and had deposited the proceeds of the sale in the banking-house of Goomun Doss and Chutter Boj Doss: and that, as her husband refused on demand to give up the house and the value of the ornaments, she instituted this suit to compel him and the said bankers to deliver up the property to her.

Baboo Bullum Doss, *gomashda* of the banking house of Goomun Doss, and Chutter Boj Doss, presented a petition to the Court, in behalf of the firm, stating that the *cotwal* of the city had deposited the sum of 1,382 rupees in their hands, in conformity with an order of the City Magistrate, under date the 13th of February 1808, passed in the case of Jewut Ram *versus* Abdoolla Shah, and declared that they were ready to deposit the money in Court, whenever they should be called upon to do so.

Jewut Ram resisted the claim of the plaintiff, on the following grounds: He stated that the plaintiff was his wife, but that some time ago she formed a criminal connection with one Abdoolla Shah: that he complained against them both in the *Foujdree* Court, when the case was, with the consent of himself and his wife, submitted to a *punchayt* for decision: that the *punchayt* gave their award in the following terms: "Mussummaut Rubbee Koor, from her profligacy, is looked upon as one dead in law (*foutee*). It is contrary to custom to leave property in the hands of one dead in law, or an idiot, lest it be destroyed, or made away with. The owners of the property in question are her husband and two respectable married daughters. It is expedient that the ornaments and other property be given up to her husband, and to Mohunlal, the husband of her eldest daughter, and that they sell the same, and deposit the proceeds thereof with some respectable banker, and that Jewut Ram and Rubbee Koor receive the interest thereof during their lives for their subsistence. After their deaths, the principal will devolve on the two daughters, who will perform their funeral rites. Let Jewut Ram and Mohunlal take Rubbee Koor home, and let them take care that she do not again take to these profligate courses. By the custom of the tribe, profligate women are entitled to nothing but maintenance:" that in consequence of this award, he and the plaintiff mutually entered into agreements

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RAM.

(*razeenamas*) to live together, the plaintiff declaring the whole controul of the property in question to be vested in him: that the magistrate decided the case according to this award: that the ornaments were sold, and the proceeds 1,382 rupees, deposited in the banking-house of Goomun Doss and Chutter Boj Doss, and that he took the plaintiff to his house, and supplied her with food and raiment from the interest of the deposit: that she remained with him nearly a year, when she again formed a criminal connection with Abdoolla Shah: that as she, by this dissolute course of life, brought disgrace on him and his family, he charged them both with adultery, but as they were acquitted by the Court of Circuit, he, having no further remedy, remained quiet. He further stated that Abdoolla Shah had instigated her to make this claim, and pleaded that she had no right to the property, as on her marriage the right thereto became vested in him.

The plaintiff pleaded in her rejoinder that she was not bound by the award of the *punchayt*, as the case was submitted to them without her consent, and that when she executed the *razeenama* she was not a free agent, having been compelled by her husband to do so.

The case came to a final hearing on the 6th of September 1813. The Court observed, that section 3, regulation 8, 1795, provided, that when the parties in a suit are of different religions, Moohumudan and Hindoo, the decision must be grounded on the law of the religion of the defendant, so that this case came under the Hindoo law. On inspecting the criminal proceedings, held at the suit of the defendant, it appeared that the decision of the magistrate, on the first complaint, was grounded on the award of a *punchayt*, composed of persons of the same caste as the plaintiff, who had not then apostatized from the Hindoo religion: and that according to this decision, she had forfeited, by her profligacy, all claim to the property in question, being entitled only to food and raiment for the support of life. The Court observed, that as she had since forsaken her own religion, and received food and raiment from Abdoolla Shah, the only ground on which she might have claimed the property of her parents no longer existed; and that her plea regarding the *punchayt* could not avail her, as she had virtually assented to the award given by them, inasmuch as she had never appealed from the decision of the magistrate, which was founded on the said award, and had lived with the defendant for nearly a year after it. Under these circumstances the Court dismissed her claim. The usual order in cases of paupers was passed with regard to the costs of suit.

The plaintiff being dissatisfied with this decision, appealed the case to the Sudder Dewanny Adawlut. That Court (present R. Ker and G. Oswald), seeing no reason to alter the decision of the Provincial Court, dismissed the appeal with costs.

RADHA KISHEN and Others, Appellants,
versus

1818.

SHAM SERMA, RAM DEB SERMA, PULTA RAM SAHOO, KISHEN SAHOO, and Others, Respondents. April 8th.

THIS action was brought in the Zillah Court of Tipperah, on the 13th of November 1818, by the appellants, who are Bramins, to establish their right to officiate as *Prohits*, or priests, to 31 families of Sahoos, who inhabit the village of Chapulpara. The suit was laid at 505 rupees, the annual amount of fees.

It was set forth in the plaint, that the ancestors of the plaintiffs, and of Sham Serma, Ram Deb Serma and the other Bramin defendants had from time immemorial held the office of *Prohit*, or family priest, to the Sahoos (a class of people of the *Bunnea* caste of Hindoos), who resided in the pergunnas of Seraieel, Zyn Shahee and Lukia, and shared the fees arising from the performance of religious ceremonies: that a partition having taken place, a four ana share fell to the ancestors of the plaintiffs, consisting of the villages of Kukalia, Taleekulla, Bullakoot and Chapulpara: that the remaining 12 anas fell to the share of the Bramin defendants, and that each party performed the usual ceremonies in the houses of their *Jujmans*, (or families employing them in sacrifices, &c.) and received the fees arising therefrom, without the interference of the other party, till the year 1206 B. S. (A. D. 1799-1800), when Kaloo Serma, Hurree Serma and others of the 12 ana sharers, interfered with the rights of the plaintiffs, and by performing the religious ceremonies in the houses of some of the Sahoos of Chapulpara deprived them (the plaintiffs) of the fees arising therefrom: that the plaintiffs having prosecuted these interlopers in the Zillah Court of Mymensing, a decree was passed in their favour by the Judge in A. D. 1804: that Sham Serma, and others again interfered in 1216, B. S. (A. D. 1809-1810), and deprived the plaintiffs of the privilege of performing the religious ceremonies for 31 families of Sahoos of Chapulpara: that they sued them in the Zillah Court of Tipperah, (to which zillah the villages had been transferred), and obtained a judgment in their favour in the Register's Court: that the case being appealed to the Zillah Judge, that officer did not think it necessary to go into the merits of the appeal, being of opinion that the decree passed by the Judge of Mymensing was sufficient to uphold the right of the plaintiffs, but directed that if that decree had not already been carried into execution, the plaintiffs should sue out execution thereof: that the plaintiffs accordingly sued out execution, and had been put in possession of nearly all their rights, when the Dacca Provincial Court, on the petition of Lukee Nurain Sahoo and others, passed an order directing that execution should be stayed, leaving the plaintiffs the option of instituting a regular suit to establish their rights. They in consequence instituted the present action against Sham Serma and others, Bramins, and Pulta Ram Sahoo, Kishen Ram Sahoo and others (31 persons) of the Sahoo caste, in order to compel the latter to employ them as *Prohits*, and the former to abstain from performing religious ceremonies in the houses of the latter to their (plaintiffs) prejudice.

1818. Sham Serma and the other Bramins denied that the plaintiffs had the exclusive right of performing religious ceremonies in the houses of the Sahoos of Chapulpara. They declared that the office of *Prohit* was not hereditary, but that the *Jujman* was at liberty to employ whatever Bramin he pleased, as his priest, and that they had officiated as priests of the Sahoos of Chapulpara by their express desire.

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Kishen and
others, v.
Sham Ser-
ma and
others.

Pulta Ram and the other Sahoos resisted the claim of the plaintiffs, on the plea that it was optional with them to employ as *Prohits* whatever Bramin they pleased. They stated that they were justly dissatisfied with the plaintiffs, as they were in the habits of demanding such exorbitant fees for the performance of sacrifices and other ceremonies, as rendered it impossible for them to have them performed properly.

The Zillah Judge was of opinion that the right of the plaintiffs to officiate as *Prohits* of the Sahoos of Chapulpara by virtue of the partition above alluded to, was clearly established both by the evidence adduced in this case, and by the decrees passed in favour of the plaintiffs by the Judge of Mymensing, and the Register of Tipperah. He therefore passed a decree, directing that Pulta Ram and the other Sahoos residing in Chapulpara should employ the plaintiffs as *Prohits* in the performance of sacrifices and other religious ceremonies; and as it appeared that, notwithstanding the former decrees, the Sahoos had contumaciously refused to employ the plaintiffs, they (plaintiffs) were enjoined to apply to the Court, in case they should persist in their refusal, in order that the Court might punish them by the imposition of a heavy fine.

The defendants appealed to the Provincial Court of Dacca. The Bramins produced no new plea. The Sahoos contended, that the *Jujman* had a right to employ any *Prohit* he pleased, and that the mere circumstance of residing in a village, which the plaintiffs claimed to have fallen to their share, did not render it incumbent on them (Sahoos) to employ them as *Prohits*. They also contended, that as the plaintiffs were not their *Kool Prohits* or family priests, that they were justified in not employing them. The respondents (plaintiffs) denied the right of a *Jujman* to dismiss his *Prohit*, alleging that the right of performing the duty of *Prohit* was frequently bought and sold like other property. The Provincial Court, seeing no reason to alter the decision of the Zillah Court, confirmed it, and dismissed the appeal with costs.

Pulta Ram and the other Sahoos, presented a petition to the Provincial Court, praying the Court to consult with their pundit, as to how the Hindoo law stood with regard to this case, and to review their judgment. The Court having consulted their pundit, received a *vyavastha* which declared that a *Jujman*, who was dissatisfied with his *Prohit*, was at liberty to dismiss him, and that every person was at liberty to appoint his own *Prohit*. The Court on this applied to the Court of Sudder Dewanny Adawlut for permission to review their judgment.

The Sudder Dewanny Adawlut, on the receipt of the application of the Provincial Court, submitted the case for the opinion of their Hindoo law officers; who gave the following answer:

“ In the question proposed by the Dacca Provincial Court, it is

not clearly stated whether the *Jujmans* (defendants) came to reside in the village at the time of the partition, or afterwards: nevertheless it would appear from the petition of the *Ritwigs* or officiating priests (plaintiffs), written in the Persian language, that the *Jujmans* came to reside in the village a considerable time after the partition had been carried into execution.

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"An officiating priest cannot claim the right of performing the duty appertaining to his office, for persons who may chance to come to reside in a village, which has fallen to his (the priest's) lot by reason of a partition.

"It is not enjoined in the *Shaster*, that the mere residence of a person in a certain place can authorize a claim, on the part of an officiating priest to the performance of the sacerdotal duty for him.

"The *Jujmans* in question admit, in their petition in the Persian language, that they have occasionally employed the officiating priests in question, and indeed therein complain of the exorbitance of the sacrificial fee (*dukshina*) demanded by the aforesaid priests.

"Now, notwithstanding these said priests are not the hereditary family priests of these *Jujmans*, still, if an officiating priest, appointed to officiate by the will of the *Jujman* himself, and being utterly immaculate (or uncontaminated,) be discarded by his *Jujman*, the latter is liable to a fine, and the priest can claim the right of performing the sacrificial duty for him.

"An officiating priest, who is afflicted with disease; one who hath not performed expiation, though degraded from the rank of his tribe; one who is insane; one anathematized; one who seeks refuge with the enemy of his *Jujman*, for the purpose of working his ruin; one who mars the reputation of his *Jujman* by a disclosure of his faults; one destitute of the knowledge required in the *Shaster* and *Shastrangu* for the discharge of the sacerdotal functions, may be discarded by his *Jujman*.

"Should an officiating priest discard a *Jujman* not degraded, or disqualified as above, or should a *Jujman* abandon an irreprehensible priest (one not disqualified as above,) then the priest, in the former case, and the *Jujman*, in the latter, would be liable to a fine of 200 *panas*."

(The authorities cited by the Pundits in support of the above opinion are taken from the *Vivada Bhungarnuvu* of *Juggurnatha Twacupunchanana*, the *Digest of Hindoo Law*, translated by Mr. Colebrooke.)

"An officiating priest discarded by his *Jujman* in consequence of his being afflicted with disease, or disqualified in any of the modes above enumerated, cannot claim the right of performing sacrificial duty for such discarding *Jujman*; relinquishment in these cases being authorized by the *Shaster*.

"Should a sacrificing priest (whether he be an hereditary priest, or one appointed by the will of a *Jujman* himself), demand from his *Jujman* a higher sacrificial fee than the latter is well able to afford to pay for the performance of sacrificial duty, for which no specific amount of fee is ordained by the *Shaster*; and should the *Jujman*, in consequence, discard the said priest, the priest may lay claim to the right of performance of sacrificial duty for the discarding *Jujman*; since the desire, on the part of the priest to

1818. obtain an exorbitant fee is not specified in the *Shaster* as a reason for abandonment."

Radha Kishen and others, v. Sham Serma and others. The Court of Sudder Dewanny Adawlut, after considering the case as detailed in the application of the Provincial Court, and the above *vyuvustha*, granted that Court permission to review their judgment, transmitting at the same time a copy and translation of the *vyuvustha* of their pundits.

The Provincial Court having readmitted the appeal, and taken another *vyuvustha* from their pundit, proceeded to reconsider the case. They observed, that the plaintiffs founded their claim on the circumstance of the Sahoos residing in the village of Chapulpara : but that neither the *vyuvustha* of their own law officer, nor that of the law officers of the Sudder Dewanny Adawlut upheld this plea. They further observed, that under the *vyuvustha* of the Sudder Dewanny Adawlut, a *Jujman* discarding a *Prohit*, who was not disqualified, is subject only to a fine of 200 *panas*. They therefore passed a decision reversing their former judgment, which confirmed the decree passed by the Zillah Judge, and dismissed the claim of the plaintiffs. The full costs were made payable by them.

The plaintiffs, being dissatisfied with this decision, applied to the Court of Sudder Dewanny Adawlut for the admission of a special appeal. They pleaded that the fine of 200 *panas* was merely levied as an atonement for the crime of discarding the *Prohit*. They urged that the *Shaster* did not authorize a *Jujman*, under any circumstances, to discard a *Prohit*, who did not labour under any of the disqualifications enumerated in the *vyuvustha* of the law officers of the Sudder Dewanny Adawlut; that it was clearly proved that the Sahoos had been their *Jujmans* for many generations, and that as they (appellants) did not labour under any of the disqualifications above enumerated, their claim could not be controverted. They prayed that the pundits might be consulted, as to the validity of the abandonment of a faultless *Prohit*, notwithstanding the payment of the fine by the *Jujman*.

Previously to the admission of the special appeal, the Court put the following questions to their pundits: 1st, is a *Jujman* authorized, under any circumstances, to discard a faultless *Prohit*, whether he be a family *Prohit*, or one appointed by the *Jujman*? 2d, If a *Jujman* discharge a faultless *Prohit*, and pay the fine, must he afterwards employ the same *Prohit* or not?

The pundits gave the following answers :

Answer 1st, " A *Jujman* has no power to discharge a *Prohit*, whether he be a family *Prohit*, or one appointed by himself, if the *Prohit* be without fault, and labour under no disqualifications : for it is laid down in the *Shaster*, that a *Jujman*, who discards a faultless *Prohit* is punishable by fine. A faultless *Prohit*, therefore, he cannot discard."

Authority, *Munnoo* in the *Vivadu Bhungarnuba*, *Vivadu Chintamunee* and other tracts: " If a *Jujman* discard a *Prohit* who is faultless, and capable of performing the duty of *Prohit*, or if a *Prohit* discharge a faultless *Jujman*, he is liable to fine of 100 *puns* "

Answer 2d, " If a *Jujman* discard a faultless *Prohit*, and pay the fine due for that offence, it is necessary for him to perform *Pra-*

yushchitta (atonement), and to re-appoint the *Prohit*; for a *Ritwig* and *Prohit* are equal: and it is incumbent on them, that they, in all matters laid down in the *Shaster*, be careful to do every thing for the advantage of their *Jujmans*, and to remove harm from them: if any discharge a *Prohit*, who should be looked upon as father, mother and *gooroo*, he is guilty of such a crime, as excludes him from eating and drinking with his tribe in this world, and will cause him to be hereafter born in the body of a *rakkis*, or demon. This crime is called *Oopù-patuk*. Moreover, it is necessary to serve such a person (a *Prohit*) as a father or mother: and the person who takes away (or withholds) the *dukshina*, or other gifts usually given by *Jujmans*, which are the means of subsistence of Bramins, is guilty of a serious offence. Let the person who discards his *Prohit*, having paid the fine to the Raja, and made the atonement (*prayushchitta*) laid down in the *Shaster* in retribution for that offence, again appoint the *Prohit* to his office. This is enjoined by the *Shaster*. It is also incumbent on the Raja to levy the fine from any of his subjects who acts contrary to his duty, and to compel him to keep to his duty (*dhurum*). The Raja is culpable, if he do not take notice of such thing.”

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ma and
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Authorities, 1st, *Vyasa Moonee* written in the *Prayushchitta Mitacshara*. “A mother, father, husband, a teacher of *munturs*, an instructor, an elder brother, a *Prohit*, &c. are (esteemed in the light of) *gooroo*s.”

2d, *Munnoo* in the *Prayushchitta Madhuva*: “To forsake a *gooroo*, the *Veds*, the consecrated (or sacrificial) fire, or a son; to deny the future state, the Deity, the *Veds*, or a *gooroo*, is considered to amount to the crime of *Oopù-patuk*.”

3d, *Munnoo* in the *Prayushchitta Madhuva*: “Whoever without cause forsakes mother, father, or *gooroo*, is an offender; it is incumbent on the elders (the great and noble) of his tribe to prohibit his appearance at the worship of the Deity, the *Sraddha*, and other family ceremonies.”

4th, *Munnoo* in the *Kurma Vivaka Prakurn*, quoted in the *Prayushchitta Madhuva*: “The person who does not perform service to an instructor, a performer of sacrifice, a *gooroo*, an adorer of the Deity and the *Moonees*, shall after death be born in the body of a *rakkis*, or demon.”

5th, *Munnoo*: “A person guilty of the crime *Oopù-patuk* (a), must perform penance. This penance is thus described by *Koolook Bhut*: Let him perform the same penance as he would for killing a cow, or let him, according to his caste and abilities, perform the *Vritta Chundrayuna*. (b)

6th, *Dikshitu* in the *Achara Madhuva*: To support a mother, a father, a *gooroo*, a wife, an orphan relation, a traveller, the consecrated fire, who are all entitled to support, is proper, and will benefit the supporter in the next world.”

7th, *Vrihat Bishnoo* in the *Achara Madhuva*. “*Munnoo* has said; ‘There are but three ways in which a Bramin can get a livelihood without sin, viz. teaching the *Veds*, causing the performance of burnt sacrifices, and receiving gifts.’”

(a) See Ward's account of the Hindoos, quarto edition, vol. 1, page 404.

(b) See *Ibid*, page 415.

1817. 8th, *Vridhdha Goutuma* in the *Kurma Vivaka Prakurn*: Who-
 Radha ever deprives a Bramin of the means of subsistence will, after his
 Kishen and death, be born seven times in the body of a frog."
 others, v. 9th, *Vriat Munnoo* in the *Smritee Sunskara*: "It is incum-
 Sham Ser- bent on the Raja to fine any person who forsakes his father, mother,
 ma, and son, teacher, or a faultless *prohit*, and to make him return to his
 others. accustomed duty."

10th, *Vridhdha Yajnyavalcya*: "It is incumbent on the Raja to fine, and keep to his accustomed duty any one who, without cause, forsakes father, mother, wife, son, *goroo*, or *prohit*."

11th, *Yajnyavalcya* in the *Rajdhurm Prakurn*, in the *Mitacshara*. "If any *kool*, *jati*, *srenee*, *gun* or *jānpud*, forsake their duty, let the Raja fine them, and keep them to it."

12th, *M tacshara*, in explanation of the above terms: "*Kool* means tribes, as Bramins and others; *jati* means caste as the *moordhavushika* and others; *srenee* means sellers of betel leaf and persons of similar occupations; *gun* goldsmiths and others; *jānpud*, barbers, washermen, &c. If any of these forsake his faith, let the Raja fine him according to his crime, and compel him to return to his duty."

13th, *Munnoo*: "If the Raja omit to fine an offender, or fine an innocent person, his reputation will suffer in this world, and it will be brought against him, as a crime, in the world to come."

The Court, after perusing this *vyuvustha*, admitted a special appeal; and as the respondents, notwithstanding due notice, did not appear to defend the appeal, it was decided *ex parte*. The Court observed, that under the *vyuvustha*, a *Jujman* cannot discard a faultless *Prohit*; that the appellants did not labour under any of the disqualifications which would authorize the respondents to discard them; and that they were capable of performing the duty of *Prohit*. They therefore (present R. Ker and G. Oswald) passed a final judgment, reversing the decision of the Zillah Judge, and the second decision of the Provincial Court, and provided that the appellants should be put in possession of their right to officiate as *Prohits* in the houses of the 31 Sahoos of Chapulpara, as claimed by them.

The costs in all the Courts were charged to the respondents. (c)

(c) The doctrine maintained by the *vyuvusthas* of the pundits of the Sudder Dewanny Adawlut in this case is illustrated and confirmed by the texts cited in the second volume of Mr. Colebrooke's *Translation of the Digest of Hindoo Law*, Book 2, chapter 3, section 113, "On Partnership among Priests jointly officiating at holy rites."

SHEO BUKSH SING, Appellant,
versus
 THE HEIRS OF FUTTEH SING, Respondents.

1818.

Aug. 18th.

THIS action was brought in the Zillah Court of Shahabad, on the 4th of December 1806, by the appellant, in order to obtain possession of 500 beegas of land, being half of mouza Chunda Khas, and of 37 beegas, 10 biswas by right of *Jethansha*, or primogeniture; in all 537 beegas, 10 biswas, the annual value of which was estimated at 940 rupees, 10 anas.

The plaintiff stated that he and Futteh Sing, his younger brother, inherited talook Chaudakoorree, situate in pergunna Arrah, from their father, and that they had divided the estate between them, with the exception of the village of Chunda Khas: that he (plaintiff) received, at the partition, in addition to a moiety of the estate, seven and an half *per cent* on the moiety that fell to the lot of Futteh Sing, by right of *Jethansha* (derived from *Jetha*, elder or first born, and *Unsha* share or portion;) that he had always received a like portion of the net profits of the village of Chunda Khas, which was held in common: that in the year 1202 F. S., Futteh Sing instituted a suit against him (plaintiff) in the Zillah Court to recover 375 maunds of wheat, which he claimed as his share of the produce of Chunda Khas, and that his plaint was dismissed by the Register of the Zillah Court, on the 27th of July 1797, on the production by the plaintiff of a document wherein the defendant had acknowledged the right of the plaintiff to *Jethansha* and of the decision of a *punchayt*, which awarded the same to the plaintiff: that this decision was confirmed, on successive appeals, by the Zillah Judge, (on 26th of June 1799), and the Provincial Court of Patna (on 6th of January 1800:) that Soodisht Doss and other cultivators of Chunda Khas, having been instigated by Futteh Sing withheld his (plaintiff's) share of the profits of the village for the years 1204 to 1207, F. S., both inclusive, that he sued them to recover the balance, and obtained a decree in his favour: that the crops being attached in execution of the decree, he received one-half of the share apportioned to the zemindar, and seven and an half *per cent* on the share of Futteh Sing, as *Jethansha*: that notwithstanding this decree, the cultivators had again, at the instigation of Futteh Sing, withheld his share of the net profits from 1208 to 1213, F. S., both inclusive, and were still in balance to him. He declared his intention of suing them to recover the arrears due to him, and instituted the present action to obtain possession of a moiety of the village of Chunda Khas, (the *Rukbeh* of which is 1,000 beegas,) and seven and an half beegas *per cent* on the moiety of Futteh Sing; and also to obtain a separation thereof from the share of Futteh Sing, in order to prevent future disputes.

Futteh Sing resisted the claim of the plaintiff to *Jethansha*, on the grounds of its not being allowed, either by the Hindoo law, or by the custom of the family, or of the country. He declared, that at the partition of the estate, he had received one moiety thereof, and that he had continued to enjoy the produce of the same,

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Sheo Buksh
Sing, v. the
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Futteh
Sing.

without any deduction of *Jethansha*. With regard to the suit formerly instituted by him, he stated, that the Courts had dismissed his claim merely on the evidence of the witnesses of the plaintiff, and that the Provincial Court, on his praying for a review of judgment, declared that their judgment could not be altered, unless the evidence of the said witnesses should be proved to be false. He pleaded that there were strong grounds for the presumption that their evidence was unworthy of credit, and that they had been bribed by the plaintiff to depose in the manner they did depose; inasmuch as Peear Chund Putwaree had lately sued the plaintiff for arrears of salary, stating in his plaint, that Sheo Buksh Sing had enticed him from his (Futteh Sing's) service, and had given him a salary, in order to induce him to give evidence in his (Sheo Buksh Sing's) favour, but that as he (Sheo Buksh Sing) had obtained decrees against Futteh Sing, he had no further occasion for his services, and had therefore refused to pay him his salary: that Sheo Buksh Sing having subsequently satisfied him, the said Putwaree filed a *razeenama*, and the plaintiff a *safeenama*, in consequence of which the suit was dismissed. With regard to the decision obtained against Soodisht Doss and the cultivators of Chunda Khas, he urged that it was no proof of the plaintiff's right to *Jethansha*, as that point had not been entered into in the case in which this decision was passed.

The plaintiff filed, in support of his claim, the decrees passed by the Courts in the cases of Futteh Sing (defendant in this case) *versus* Sheo Buksh Sing, and Sheo Buksh Sing (plaintiff in this case) *versus* the cultivators of Chunda Khas.

The Zillah Judge was of opinion that the points at issue in this case were two, viz. the right of the plaintiff to *Jethansha*, and his claim to have a moiety of the village separated from the share of the defendant.

With regard to the first point, he was of opinion, that the decision passed in the case of the cultivators of Chunda Khas, did not affect the claim, as the right to *Jethansha* was only mentioned therein incidentally, and did not appear to have been a point at issue. From the decisions passed in the other case, it appeared that they were founded solely on the evidence of the witnesses of the plaintiff; the only documents brought forward by the plaintiff in support of his claim being the award of a *punchayt*, and a Hindee document said to have been executed by the defendant. The award of the *punchayt* had been declared to be invalid by the Zillah Judge in his decision on appeal from the decision of the Register, under date 26th of June, A. D. 1799, as it appeared that the agreement to abide by the decision of the *punchayt* was executed by Futteh Sing, when under surveillance of a *peadali*. The Hindee document purported to be an acknowledgment on the part of the defendant, of the plaintiff's right to *Jethansha*, at the rate of 8 beegas, 6 biswas, and $13\frac{1}{2}$ doons per 100 beegas of land. The Zillah Judge was of opinion, that this document could not avail the plaintiff, as he had not mentioned it in his plaint, and as he would not have claimed *Jethansha* at the rate of 7 beegas 10 biswas, had he, under that document, a right to 8 beegas, 6 biswas $13\frac{1}{2}$ doons per 100 beegas. He observed, that the Provincial

Court had declared in their *roobukaree* of the 4th of March 1800, 18 17.
(on the application of the defendant for a review of judgment,) Sheo Buksh
that the decisions passed in the case could not be reversed as long Sing, v. the
as the evidence of the witnesses of Sheo Buksh Sing, on which Heirs of
those decisions were founded, remained unimpeached. From the Futeh
perusal of certain papers in the case of Pekar Chund Putwaree Sing.
versus Sheo Buksh Sing, it was clearly proved that the evidence of
Pekar Chund was obtained by bribery, as stated by the defendant.
He (the Zillah Judge) was therefore of opinion, that the evidence
of the whole of the witnesses was so shaken by this fact, as to be
utterly void of credit, and that as the plaintiff's right to *Jethansha*
rested solely thereon, his claim thereto was not maintainable.
With regard to the second point at issue, viz. the separation of a
moiety of the village, it was proved by the production of papers,
and the acknowledgment of the plaintiff's vakeel, that the said
moiety was entered in the Collector's records, in the name of
Sunaut Sing, the son of the plaintiff. As he, therefore, was not a
party in this suit, the Zillah Judge was of opinion that no order
for the separation could be passed. He therefore passed a decree
dismissing the plaintiff's claim with costs.

The plaintiff appealed to the Provincial Court of Patna, on the
plea that his right to *Jethansha* had been recognized by the decision
of the Register of the Zillah Court, dated 19th of July 1797,
which was confirmed, on successive appeals, by the Zillah Judge
and the Provincial Court, and by other documents. The defendant
resisted the claim on the grounds before urged, and on the
plea that *Jethansha* was not allowed by the Hindoo law, and that
the right to *Jethansha* had not been argued in the former case.

Previously to entering into the merits of the case, the Provincial
Court put the following question to their pundit: "A Hindoo
sues his younger brother for *Jethansha* on the property which was
inherited from their father. Is this claim sanctioned by the Hindoo
law?" He answered, "In the *Cali yoog*, *Jethansha* is prohibited
by the *shaster*." After perusing the whole of the proceedings of
the Zillah Court, the pleadings filed before them, and the *vyavus-
tha* of their pundit, the Court were of opinion that the decision of
the Zillah Judge was correct, and as *Jethansha* was forbidden by
the *shaster*, they passed a decision, confirming the Zillah decree
with costs payable by the appellant.

The plaintiff, being still dissatisfied with the decision of the
Provincial Court, presented a petition to the Court of Sudder
Dewanny Adawlut, praying that a special appeal might be ad-
mitted. Previously to the admission of the special appeal, the
Court consulted their pundits, who were desired to state whether
Jethansha was authorized by the Hindoo law current in Behar.
They gave their opinion in the following terms:

"Though *Jethansha* is mentioned in the *shaster*, yet it is for-
bidden in the *Cali yoog*; therefore the claim of the appellant to
Jethansha is not authorized by the *shaster*.

Authorities, 1st, *Aditya Poorana*, cited in the *Veera Mitro-
daya*, *Vivada Tanduva*, and other tracts. "In the *Cali* age
these things are forbidden: the second gift of a damsel once given
away in marriage: deduction in right of primogeniture: the

1818. sacrifice of a bull: the procreation of offspring on a widow by her husband's brother: entering the order of ascetics"
 Sheo Buxah 2nd, *Mitacshara, Vivada Mudhuva, Vivada Tanduva, Veera*
 Sing, v. the *Mitrodaya*. "As it is prohibited to procreate offspring on a
 Heirs of widow; and as it is prohibited to sacrifice a cow, so it is prohibited
 Futteh to make a deduction in favour of the eldest son."

Sing.

The appellant having stated that the custom prevailed in the part of the country where the estate lay, the pundits were desired to state, whether this custom could be upheld, notwithstanding the prohibition of the *shaster*, if it appeared that such was the custom of the country. They replied that the custom might be upheld under the *shaster*, notwithstanding the prohibition, if it should appear to have prevailed for any length of time, with the consent of the inhabitants of the country. The authorities for this opinion are in the *Vivada Tanduva, Veera Mitrodaya, Vyuvuhara Mayucha* and other tracts. The Court being of opinion that this was a case in which a special appeal should be admitted, admitted the appeal accordingly.

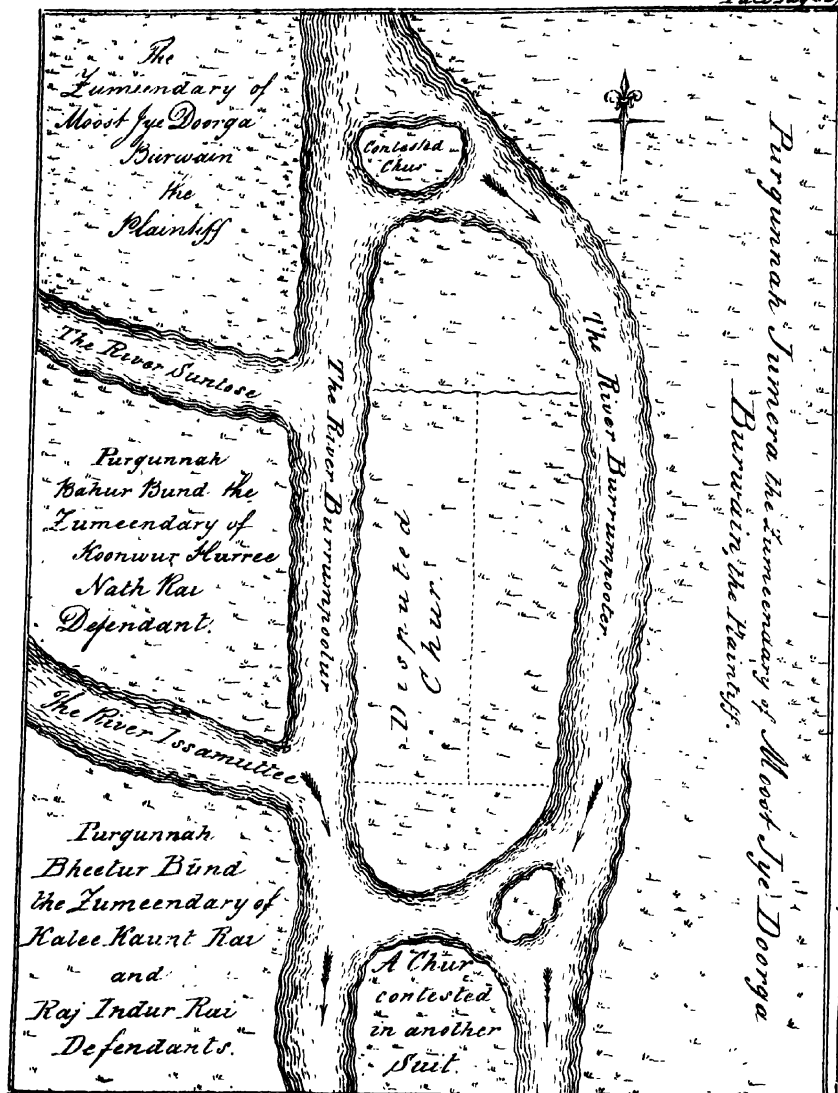
Futteh Sing, the respondent, died at this stage of the proceedings, and Guldeb Sing, Buwanee Sing, Radha Kishen and Gunga Bishen, his sons, and Telook Nath, Chutterboj Lal and Pertaub Nurain, his grandsons, appeared to defend the appeal as his heirs.

The Court (present G. Oswald), after maturely weighing the proceedings, were of opinion that the claim of the appellant to *Jethansha* could not be upheld, as the custom of giving a larger share in right of primogeniture did not appear to have prevailed in the family of the parties, and was moreover prohibited by the *shaster*. A final judgment was accordingly passed on the 18th of August 1818, confirming the decisions passed by the Zillah Judge and the Provincial Court, which dismissed the claim of the plaintiff. The costs in all the Courts were made payable by the appellant.

Map.
Of Alluvial Land, ~~cont'd~~ in Case 7
of 1818.

Koonwur Hurree Nath Rai, v. Moost Jye Doorga Burwain

Page 2.



KOONWUR HURREE NATH RAI, (Minor, through his
Guardians and the Managers of his estate), Appellant,

versus

MUSSUMMAUT JYEDOORGA BURWAIN, Respondent.

1818.

Sept. 9th.

THIS action was brought in the Zillah Court of Rungpoor on the 29th of December 1810, by the respondent, the zemindar of alluvial pergunna Jumera, to recover from Koonwur Hurree Nath Rai, the zemindar of pergunna Bahur Bund, and Kalee Kaunt Rai and Raj Indur Rai, zemindars of pergunna Bheetur Bund, about 550 *koolbehs* of alluvial land. Claim of land: the river Burrumpooter flowing on each side of the land claimed, it was divided among the parties, whose estates lay on either side thereof.

It was set forth in the plaint, that, in course of time, nearly 1,500 *koolbehs* of land had been swept away by the encroachments of the river Burrumpooter from different villages in the plaintiff's zemindaree, and that about 550 *koolbehs* had become attached to the *churs* of Toopla Jookha and Chooker Chur, forming part of the same estate: that the land on these *churs* was not in a regular state of cultivation, but that Boor Chund Burowa, the plaintiff's father-in-law, and Beer Chund Burowa, her husband, had successively received the rents arising from the *julkur*, *bunker*, and pasturage of the said *churs*, and that the defendants, the zemindars of Bahur Bund and Bheetur Bund, had unjustly taken possession thereof. The plaintiff therefore instituted this suit, to recover possession thereof; laying the suit at 857 rupees, the estimated annual produce.

The guardians and managers of the estate of Koonwur Hurree Nath Rai, who was a minor, defended the suit on his behalf. They denied the right of the plaintiff, and alleged the land in question to belong to mouza Bulubha Khas, situate in the pergunna of Bahur Bund. The zemindars of pergunna Bheetur Bund declared that the *churs* in question belonged to mouza Nurainpoor, situate in their zemindaree.

An *aumeen*, deputed by the Judge, proceeded to the spot, and made the necessary enquiries in presence of the agents of all parties, and gave in his report to the Judge, but as the suit did not come on immediately, he did not remain in attendance on the Court to make oath to the truth of his report. The Judge did not, however, think that this was necessary, as he had executed a *hulfnama* previously to entering on his duties as *aumeen*. It appeared from the map given in by the *aumeen* (copy of which is annexed), that the Burrumpooter flowed on all sides of the disputed land; that the plaintiff's zemindaree lay on the east and north sides thereof; that on the west side, the plaintiff's zemindaree extended from the northward as far south as the river Suntose; the zemindaree of Koonwur Hurree Nath Rai from river Suntose to the river Issamuttee; and the estate of the zemindars of Bheetur Bund from the river Issamuttee to the southward beyond the limits of the contested *chur*, and that another *chur*, the right to which was contested in another suit, lay to the south. The *aumeen* reported that the contested land belonged to the plaintiff.

The Judge observed, that it was impossible to decide with any certainty, from whose lands the *chur* was formed, as the witnesses

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maut Jye
Doorga
Burwain.

of each party gave evidence in favour of the party who summoned them, consequently contradicting each other. He was therefore of opinion, that the most equitable mode of decision would be to give to the parties respectively the land adjoining to their respective estates; and ordered that the land to the northward of a line drawn east and west from the river Suntose to the plaintiff's boundary should be taken by the plaintiff; that the remaining portion, to the southward of that line, should be divided by a line drawn from north to south; and that the land to the eastward should belong to the plaintiff, and the land to the westward should be taken by the zemindars of Bahur Bund and Bheetur Bund, according to their respective boundaries. Each party was ordered to pay their own costs.

The guardians of Koor Hurree Nath Rai appealed from the decision of the Zillah Judge to the Provincial Court of Moorshebadad, on the plea that the *aumeen* had given in a partial statement, favourable to the plaintiff, and had absconded without swearing to the truth of his report. They stated that the *chur* had belonged to pergunna Bahur Bund for 30 years, and prayed that another *aumeen* might be deputed for the purpose of making a fresh investigation.

The respondent was also dissatisfied with the decision of the Zillah Court, which awarded to her only part of the contested land, whereas the *aumeen* had reported that the whole thereof belonged to her estate, and stated that the whole of the *chur* was not new land, the accumulation having taken place on the *churs* of Toopla Jookha and Chookeer Chur, which had always formed part of her zemindaree. With regard to the *aumeen*, she urged that he executed a *hulfnama* before he entered on his duties, and remained in attendance on the Court for six months, when the appellant tampered with him, and induced him to conceal himself.

The Provincial Court did not consider that the circumstance of the *aumeen's* not having made oath to the truth of his report, after having given it in, invalidated his statement, and observed that the Zillah Judge did not decide the cause merely on the *aumeen's* report, but according to his own judgment. As no reason therefore appeared why the decision of the Zillah Judge should be altered, the Court passed judgment confirming it; each party paying their own costs.

The appellant, being still dissatisfied, presented a petition to the Sudder Dewanny Adawlut for the admission of a special appeal. Both parties expressed their dissatisfaction with the decisions of the Zillah and Provincial Courts: each declaring that the branch of the Burrumpooter, which flowed under their own boundary, was fordable; while the other branch was broad and deep. They therefore each claimed the contested land, on the grounds of former decisions by the Sudder Dewanny Adawlut, wherein that Court had decided that the grand channel of a river should form the division between the estates, in cases of alluvial land so situated.

The Court (present W. Blunt), was of opinion that the report of the *aumeen* was not to be set aside on account of his not having attested the truth of it on oath after he had delivered it in, as he

had subscribed a *hulfnama*, previously to being deputed, and had made his enquiries on the spot in the presence of the agents of all the parties concerned. A final decision was therefore passed, confirming the decrees of the inferior Courts. The costs were made payable by the parties respectively.

BUNSEE DHUR NUNDEE, Appellant,
versus
 MIRZA MOOHUMMUD SHUREEF, Respondent.

1818.

Sept. 15th

THE appellant instituted this suit in the City Court of Dacca, on the 2d of February 1807, to recover from Mirza Moohummud Buddee, the father of the respondent, the sum of 5,585 rupees, on account of a balance of cash.

Determined that entries in the books of a banker, unsupported by other proof, are not sufficient evidence to prove a debt.

The plaintiff, who was the owner of a banking-house in the city of Dacca, stated in his plaint, that the defendant had dealings with him for some time, from the 9th *Magh* 1197, B. S., (29th of January 1791), to the end of *Chey*t 1206, B. S. (10th of April 1799), and was in the habit of taking up sums of money, for which he sometimes gave vouchers, and sometimes not; but that he used occasionally to settle accounts with the *gomashtas* of the firm; that at the expiration of the period in question, he owed the firm the sum of 5,585 rupees, and that on his refusal to pay the debt, he (plaintiff) had instituted the present action for the recovery thereof. The defendant denied the debt. He acknowledged that he had had dealings with the house, and that he had occasionally settled accounts with the *gomashtas*. He stated that subsequently to the 29th *Magh* 1201 (9th of February 1795), he had a sum of money in the hands of the firm, and from that time; had been unable to get the *gomashtas* to come to any settlement; and that instead of his owing money to the firm, the firm was in debt to him. He denied ever having drawn any sum from the firm, without giving a written voucher for the same. Each party produced books of accounts and named witnesses, to prove their respective pleas. Previously to deciding on the case, the City Judge directed his *serishtadar* to inspect and compare the account books given in by the parties. Having done so in presence of the *vakeels* of the parties, he gave in a report, whence it appeared that the sum of 5,585 rupees, 7 *anas*, 2 *gundas*, 2 *cowries*, was entered in the plaintiff's books against the defendant. The witnesses of the plaintiff deposed, that the books of the plaintiff were correct, and those named by the defendant, who were the persons to whom the plaintiff stated that the money was paid without vouchers, denied that they had ever received any money on account of the defendant without giving a voucher under the defendant's own hand.

The City Judge observed, that it was a notorious fact, that at the time these transactions took place, the defendant was a young

1818. man who lived at great expence; that the witnesses named by him were his own private servants; that the plaintiff was a respectable banker who had very extensive dealings, and that his witnesses were his *gomashtas*, men of the greatest respectability; and that these persons used to enter any sums, which were drawn by the defendant without vouchers, in the account books of the firm, which being examined were found to be kept up in the same manner as the books of all respectable merchants. The Judge therefore, taking into consideration all the circumstances of the case, was of opinion that the plaintiff was entitled to a decree, and passed judgment, that the defendant should pay to him the sum claimed with costs.

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The defendant appealed to the Provincial Court of Dacca. He observed that the Judge had objected to his witnesses because they were his servants, and pleaded that the same objection might be urged against the witnesses named by the plaintiff; and that as his witnesses were the persons to whom the sums entered in plaintiff's books, for which no vouchers were produced, were said to have been paid, it was but just that their evidence should be received. The respondent brought forward the same pleas as he adduced in the Zillah Court. The Provincial Court observed, that the decision of the Zillah Judge was founded on supposition: that the plaintiff had been unable to produce a single voucher, written by the defendant, to support his claim: and that though his witnesses had deposed that such and such items had been entered in his (plaintiff's) books, as having been paid on account of the defendant, yet there was no proof that the persons, to whom the said sums are said to have been paid, were authorized by the defendant to receive sums of money on his account; or that he was aware that they had been so received, or that they had been expended for his use: that the claim rested solely on the books of the plaintiff, which, being unsupported by any written document or voucher, could not be received as evidence. They therefore passed a judgment reversing the decree of the City Judge, and dismissed the claim of the plaintiff with costs.

The plaintiff being dissatisfied with the decision of the Provincial Court, preferred a petition of appeal to the Sudder Dewanny Adawlut, *in form pauperis* (he having in the interim failed in business), and pleaded that his claim had been clearly established by evidence of his witnesses, as well as by the production of his books of accounts, and that the books of bankers had always been received by the Civil Courts as legal evidence. The Court admitted a special appeal. Mirza Moohummud Buddee having demised at this stage of the proceedings, his son and heir, Mirza Moohummud Shureef, appeared to defend the appeal.

The Court (present W. Blunt) having considered the whole of the proceedings, was of opinion that the decision of the Provincial Court was just and proper, and that the appellant's books, unsupported by vouchers, were not sufficient evidence of the debt. A final judgment was therefore passed, confirming the decree of the Provincial Court and dismissing the appeal. The order usual in the case of pauper suitors was passed with regard to costs.

- MEER MERUK HUSEIN, (Heir of MEER ENAYUT ALI,
deceased,) Appellant,
versus

1818.

Sept. 23d.

RAJA TAJ ALI KHAN, (Son and Heir of the late RAJA EMAUM
BUKSH KHAN,) Respondent.

THIS action was instituted in the Zillah Court of Behar, by the A *mokurre-*
respondent on the 2d of February 1807, to set aside, as illegal, a *ree pottah*,
mokurreree pottah, under which the appellant held the village of or lease in
Mukundpoor Jobe, pergunna Semaye; to obtain possession of the perpetu-
village, and to recover from the appellant the sum of 994 rupees, der-
11 anas, and 7 pie, balance of revenue due for the years 1213 and granted
1214, F. S. subse-

It was set forth in the plaint, that Raja Emaum Buksh Khan, quently to
the father of the plaintiff, obtained from the Collector at the set- the enact-
tlement of 1196, F. S. (A. D. 1788-9) a *mokurreree pottah* for the ment of re-
village in question at a fixed annual *jumma* of 401 rupees: that he gulation 44,
immediately granted a lease thereof to Meer Enayut Ali, having 1793, set
executed a *pottah* in the name of Furhut Ali at a *jumma* of the provi-
451 rupees: that on the death of Furhut Ali in 1203, F. S. (A. D. sions of
1796-7) the Raja sent his people to collect the rents from the ryots, section 2,
but that on Meer Enayut Ali's agreement to pay an advance on the of that re-
jumma, the Raja granted him a new *mokurreree pottah* at a fixed gulation.
annual *jumma* of 501 rupees, and on the entreaties of Meer Enayut
Ali, antedated the *pottah*, making the date thereof 1196, F. S.
(A. D. 1788-9); that Meer Enayut Ali dying without issue in the
month of *Chey*t 1204, F. S. (March, April 1799) the Raja again sent
his *umlah* to collect the rent, but Meer Meruk Husein (the defen-
dant), brother-in-law of Meer Enayut Ali, having taken pos-
session of the village, would not allow the Raj's *umlah* to interfere:
that Raja Emaum Buksh dying about this time, was succeeded in
his estate by his son, the plaintiff: that he (the plaintiff), not being
acquainted with the circumstances of the case, received from the
defendant what he offered as rent; but that on settling accounts
with him, it was found that the defendant was indebted to him the
sum of 173 rupees, 14 anas, 1 pie, the balance of rent for the year
1213 F. S., and that he had realized the sum of 820 rupees, 13 anas,
6 pie, from the *budee* and *khureef Fusuls* of 1214, F. S. The plain-
tiff instituted this suit to recover the sum of 994 rupees, 11 anas,
1 pie; to obtain possession of the village, (the annual produce of
which was stated to be 1,224 rupees), and to have the *pottah* set
aside on the following grounds: 1st, because the *pottah* was contrary
to the provisions of section 2, regulation 44, 1793, which prohibits
the grant of a *pottah* for a period exceeding ten years; 2nd, because
the original grantee was dead: and 3d, because the defendant had
fallen in arrears, and that the *pottah* was revocable on this ac-
count under the seventh clause of section 15, regulation 7, 1799.

The defendant in reply, stated, that when Rajah Emaum Buksh
Khan obtained a *mokurreree pottah* from the Collector in 1196,
F. S. (A. D. 1788-9), the village, which had been neglected, was
in a very uncultivated state; that Enayut Ali obtained from him a

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mokurreree pottah in the same year at a fixed annual *jumma* of 501 rupees, and, by expending large sums of money on the village, brought it into a state of cultivation: that on his death his widow Mussummaut Ameena, (sister of the defendant), succeeding to his property as heir, made over the whole to defendant by a deed of gift: that he held the village in question under the said gift, and that the Raja, having attempted to take forcible possession thereof, was fined by the magistrate at his suit. He urged the following objections to the *pottah* being set aside: 1st, that this action was barred by the rule of limitations, the *pottah* having been acted upon for nineteen years: 2nd, that section 2, regulation 44, 1793, was irrelevant to the case, the rule therein contained applying to leases granted under the decennial settlement, not to leases granted previously to that settlement: 3d, that the *pottah* was not granted merely for the life of Enayut Ali, but to him and to his heirs for ever (*nusulun baad nusulun*): and 4th, that he had tendered the arrears to the plaintiff, but that he had refused to receive them, with a view, probably, of taking advantage of the seventh clause of section 15, regulation 7, 1799, which, he however pleaded, did not apply to *mokurreree* leases, but only to leases for a limited period.

The defendant filed a *mokurreree pottah*, dated 11th *Rubbees oos sanee* 1196, F. S. (corresponding with the 9th of January 1789), bearing the seal of Moohummud Kaduree Raja Emaum Buksh Khan, granting the village of Mukundpoor Jobe, Pergunna Semaye (the *rukbeh* of which is said to be 3,105 beegahs, 15 biswas), to Meer Enayut Ali, at a fixed annual rent of 501 rupees, from the year 1196, F. S., to be held by him and his heirs (*nusulun baad nusulun*), as long as his (the grantors), *mokurreree pottah* from Government should remain in force. He also filed an *umul dustuk*, executed by Raja Emaum Buksh Khan, desiring the ryots and the revenue officers of the village to consider Enayut Ali as the *mokurrereedar* thereof: 10 *dakhilehs* or receipts, granted by Rajah Emaum Buksh Khan and the plaintiff for the rent of the village, the first for the rent from 1196 to 1202, F. S., inclusive, the others for the rent of the year 1203 to 1211, F. S., inclusive; and certain other documents (*jumma wasil baki*, *jumma khurch*, &c.). The plaintiff filed a *kistbundee* for the year 1196, F. S., signed by Furhut Ali, and countersigned by Meer Enayut Ali as his *malzamin*, or security, and other documents.

The Acting Judge of the Zillah Court was of opinion, that the *pottah* in question could not be set aside under the provisions of section 2, regulation 44, 1793, as it was granted previously to the enactment of that regulation, and as it had been ruled by the Provincial Court of Patna, in the case of Govindram, appellant, *versus* Kureemoonissa, respondent, (copy of which decree was filed), that a *mokurreree pottah* granted in the year 1197, F. S. (A. D. 1789-90), could not be affected by the operation of regulation 44, 1793, which was not enacted till the 1st of May 1793, (6th *Bysakh* 1200, F. S.): and that such *sunnuds* were upheld by sections 19 and 49, regulation 8, 1793, section 7, regulation 44, 1793, and the fifth clause of section 29, regulation 7, 1799. With regard to the other pleas set up by the plaintiff, he observed,

that the death of the original grantee did not affect the validity of the *pottah*, as it was granted *nusulun baad nusulun* to him and his heirs for ever, and that it was clearly proved by the evidence of the witnesses of the defendant that he tendered the arrears, and that the plaintiff refused to receive them. He therefore, on the 24th of July 1807, dismissed the claim of the plaintiff with costs. 1818.

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The plaintiff appealed to the Provincial Court of Patna, on the following grounds: that the *pottah* which he wished to set aside was not granted to Meer Enayut Ali in 1196, F. S.: that the original *pottah* was granted in 1196, F. S. to Furhut Ali, at an annual *jumma* of 451 rupees; and that after his death, Meer Enayut Ali in the year 1203, F. S. (A. D. 1795-6) obtained from Raja Emaum Buksh Khan a *mokurreree pottah* for the village at an enhanced *jumma* of 501 rupees, and that, though with a view to evade the provisions of regulation 44, 1793, (enacted on the 1st of May 1793, corresponding with 6th *Bysakh* 1200, F. S.) he prevailed on the Raja to date the *pottah* in 1196, F. S., the *pottah* was *bonâ fide* granted in 1203, F. S., subsequent to the enactment and contrary to the provisions of regulation 44, 1793: that a reference to the proceedings held in the case of Furhut Ali *versus* Rogonath Patuk would prove that the original *pottah* was granted to Furhut Ali, inasmuch as he instituted the suit in his capacity of *mokurrereedar* under the *pottah*, and after his death, Meer Enayut Ali and the respondent successively carried on the suit as his heirs. He denied that he had refused to receive the arrears, and stated that the witnesses of the respondent had given false evidence, and that the arrears had accrued solely from the fault of the respondent.

The respondent contended that the *pottah* under which he claimed to hold the village was actually granted to Meer Enayut Ali in 1196, F. S., and that no evasion had been resorted to. He brought forward other pleas similar to those stated in the Zillah Court.

The case came on in the first instance before Mr. Courtney Smith, the Third Judge. He was of opinion that the provisions contained in sections 19 and 49 of regulation 8, 1793, section 7, regulation 44, 1793, and the fifth clause of section 29, regulation 7, 1799, which he considered similar in operation, had all reference to *istimraree* grants made previously to the decennial settlement. He observed that the *pottah*, under which the respondent claimed the village, was proved to have been granted in 1203 F. S., subsequently to the decennial settlement, and that the antedating thereof was evidently intended as an evasion of the regulations. Under a doubt, however, as to the construction of the provisions above quoted as applicable to the case, he, on the 27th of December 1810, directed that the case should lie over for the opinion of the other Judges of the Court.

The case was next taken up by the Hon. J. R. Elphinstone, the Second Judge, who concurring in the opinion of the Third Judge, that the *pottah* was granted to Enayut Ali in 1203, F. S., and consequently in opposition to the provisions of section 2, regulation 44, 1793, passed a decision, on the 24th of October 1811, dismissing the appeal and reversing the decree of the Zillah Court:

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and directed that the appellant should be put in possession of the village, and that the respondent should pay to him the arrears claimed, and all the costs of suit.

The respondent being dissatisfied with this decision, presented a petition, accompanied by the usual documents, to the Court of Sudder Dewanny Adawlut, praying that Court to admit a special appeal. The Court, (present Messrs. J. Fombelle and James Stuart,) observed in their *roobukaree* of the 21st of November 1812, that the Third Judge of the Patna Court had not distinctly stated it as his opinion that the decree of the Zillah Judge should be reversed, but merely recommended that the proceedings should be submitted to the Court at large, with a view of taking their opinions as to the construction of certain provisions applied to this case by the Zillah Judge; and that it was not competent to the Second Judge of that Court to pass a final judgment on the case. They therefore recommended the petitioner to apply to the Patna Court for a review of judgment, declaring at the same time, that if that Court should not think proper to review their judgment, he was at liberty to make another application to the Sudder Dewanny Adawlut for a special appeal, which would immediately be admitted.

The petitioner, (the respondent in the Provincial Court,) in consequence of this recommendation, applied to the Patna Court for a review, pleading that section 2, regulation 44, 1793, had been rescinded by section 2, regulation 5, 1812, so that his *pottah* was valid under sections 19 and 49 of regulation 8, 1793, and the fifth clause of section 29, regulation 7, 1799; under which section the Court had upheld many *mokurreree pottahs*; and that the Governor General in Council had declared, in his orders of the 5th of September 1799, that the *mokurreree* tenures in Zillah Behar were hereditary and transferrable by gift or sale, and that the heirs of the *mokurrereedar* on his death, or the donee or purchaser, were entitled to immediate possession thereof.

The Provincial Court, having obtained permission to review their judgment, proceeded to reconsider the case.

Mr. Hugh Cornish, Acting Judge of the Court, was of opinion that it was proved by the evidence and documents filed, that though the *pottah* was granted originally to Furhut Ali, yet as he was merely the *furzee* of Meer Enayut Ali, the real grantee, the *pottah* ought to be considered as having been granted previously to the decennial settlement. He was also of opinion, that the arrears had accrued from the refusal of the appellant to receive the rents, with a view apparently of pleading the arrears as a reason for setting aside the *pottah*. He, therefore, on the 23d of February 1814, recorded it as his opinion that the zillah decree should be upheld, and ordered that the case should lie over for the opinion of the other Judges.

The case was taken up by Mr. John Miller, the then Third Judge. At this stage of the proceedings the *vakeels* of the appellant filed certain papers from the case of Furhut Ali *versus* Rogoonath Patuk, before alluded to. The Third Judge observed, that the following facts were proved by the evidence and the documents filed in the proceedings: that after Raja Emaum Buksh Khan had obtained

a *mokurreree pottah* for the village in question from the Collector in the year 1196, F. S., at a fixed annual rent of 401 rupees, he immediately granted a *pottah* to Meer Enayut Ali, under the *furzee* or fictitious name of Furhut Ali his adopted son, to be held by him and his heirs at a fixed rent of 451 rupees: that Meer Enayut Ali had possession of the village: that at the death of Furhut Ali in the year 1203, F. S., a new *pottah* was granted to Meer Enayut Ali at an enhanced *jumma* of 501 rupees, to be held by him and his heirs at that *jumma* for ever; and that he prevailed on Raja Emaum Buksh Khan to date the *pottah* the 11th *Rubbee oos sanee* 1196, F. S. Hence he was of opinion, that the original *pottah* of 1196, F. S. was virtually cancelled by the second *pottah*, and no longer in force; that the second *pottah*, having been granted subsequently to the decennial settlement, and antedated with a view of evading the provisions of section 2, regulation 44, 1793, was invalid, and that the respondent could not, under that *pottah*, maintain a claim to the village. In conformity therefore with these sentiments, he recorded his opinion, that the Zillah decree should be reversed, and the *pottah* set aside; and that the appellant should be put in possession of the village, and should receive from the respondent the sum of 173 rupees, 4 anas, 1 pie, as the arrears of 1213, F. S., and 501 rupees as the rent for 1214, F. S.; the appellant not having proved that the respondent had realized the sum of 850 rupees, 13 anas, 6 pie, from the produce of the village during that year.

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Mr. A. Welland, the Senior Judge, concurring in the view taken of the case by the Second and Third Judges, passed a final judgment, on 11th of April 1814, reversing the Zillah decree, and setting aside the *pottah* as invalid; and directed that the appellant should be put in possession of the village. With regard to the arrears of rent and mesne profits, he observed, that it did not appear that the respondent had resisted the claim from a fraudulent motive, but from a mistaken construction of the regulations. He therefore, with the concurrence of the *vakcels* of the parties, and with a view to prevent disputes regarding the mesne profits, directed that the respondent should pay to the appellant the sum of 173 rupees, 4 anas, 6 pie, the arrears of 1213, F. S.; the sum of 501 rupees for the rent of 1214, F. S., and the like sum for each year during which he had possession of the village after the passing of the decision of the Second Judge, on the 24th of October 1811: viz. from the year 1215, F. S. The costs were made payable by the parties respectively.

The respondent being still dissatisfied with the decision of the Provincial Court, appealed to the Court of Sudder Dewanny Adawlut, laying the amount at ten times the difference between the *jumma* claimed by the appellant to the Provincial Court (1,224 rupees), and the *jumma* acknowledged by himself (501 rupees), making the sum of 7,230 rupees. This amount being such as to render the suit regularly appealable under the regulations in force when the case was decided by the Provincial Court, an appeal was admitted, but the Court (present W. Blunt) on hearing the cause, seeing no reason to alter the decision of the Patna Court, confirmed it. The costs were charged to the parties respectively.

1818.

COLLECTOR OF BENARES, Appellant,

versus

Sept. 25th. SHEO NURAYN SING, and BHUMUN SING, Respondents.

The Courts are not authorized to interfere with the revenue officers, or to pass orders, in a summary manner, in matters relating to the settlement of estates.

THE object of the present appeal was to decide, whether a Court of civil judicature is authorized to interfere, in a summary manner, with a Collector, who has been directed by the superior revenue authorities to make a new settlement of an estate.

The respondents instituted a suit against Government in the Zillah Court of Juanpoor, to recover possession of mouza Dehree, pergunna Kurakut. The plaint was in substance as follows: "Mouza Dehree has been the hereditary zemindaree of our family for upwards of seventy-eight years, and our ancestors paid the revenue thereof till the year 1197, F. S. At the settlement of 1197, F. S., Baboo Juggut Sing, the *aumil* of pergunna Kurakut, who was at enmity with our family, tried to deprive us of the *zemindaree*, and for that purpose raised the *jumma* thereof to 1,400 rupees. Ram Buksh Sing, rather than lose the hereditary estate, agreed to pay the enhanced assessment, notwithstanding which, the *aumil* refused him a *zemindaree pottah*, but granted him a *moostajuree pottah*, under which he held the village, and paid the rents till his death. After his death, Dulthumun Sing, his son, obtained a *fouteenume pottah*, and paid the rents till A. D. 1809. In A. D. 1810, he went in search of service, leaving with me, Sheo Nurayn Sing, a *mokhtarnama* to manage the estate for him during his absence. Under this *mokhtarnama* we have held possession of the village, and paid the rents up to last *kist* of *Kuwar* 1225, F. S. (October A. D. 1817.) About four years ago, one Oudhun Sing, an inhabitant of the village, presented a petition to Mr. Salmon, the late Collector, stating that Dulthumun Sing was dead, and claiming to be allowed to engage for the village as zemindar. Mr. Salmon, after a summary enquiry, declared that as Dulthumun Sing was still alive, no new settlement could be made. About two years after, he presented a second petition to the present Collector, and obtained a similar answer. After another year, he presented a third petition, when the Collector, contrary to the former orders, advertised the estate for a new settlement, and deputed a *Suzawul* to collect the rents thereof on the part of Government. As the estate is our hereditary *zemindaree* we now sue Government to establish our claim thereto, and pray that an order be issued to the Collector, enjoining him to remove the *Suzawul*, and not to dispossess us or proceed in the new settlement, till the decision of the present suit.

The Judge of Zillah Juanpoor, on 13th of July 1818, issued a precept to the Collector, directing him to stay his proceedings, and not to dispossess the petitioners till further orders, and to transmit to the Court the papers relating to the case. The Collector appealed from this order to the Provincial Court of Benares. The Provincial Court was of opinion, that as the *jumma* of the estate could not be raised, no loss would be sustained by Government by allowing the petitioners to retain possession of the estate till the suit was decided, and that the orders passed by the

Collector on the petitions of Oudhun Sing entitled the petitioners to hold possession. The order passed by the Zillah Judge was therefore confirmed. 1818.

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Sing.

The Collector reported the circumstances of the case to the Board of Commissioners, and was ordered to appeal from the order of the Provincial Court to the Court of Sudder Dewanny Adawlut. He stated in his petition of appeal, that on the death of Itam Bukhs Sing, the farmer, the settlement made with Dulthumun Sing was not confirmed by the revenue authorities, but that he continued to pay the rents on a *purwanna* from the Collector: that as nothing had been heard of him for a long time, and as he had not made his appearance, notwithstanding the issue of frequent proclamations, the Board of Commissioners, on the presumption of his death, directed him (the Collector), on the 29th of October 1817, to resettle the village with the proprietors, or, in the event of their not coming forward, with farmers on good security: that he, in obedience to the said orders, deputed a *Suzawul* to collect the rents on the part of Government, on which the respondents, calling themselves the heirs of Dulthumun Sing, instituted a suit in the Zillah Court of Juanpoor, and the order appealed from was passed by the Zillah Judge, and confirmed by the Court of Appeal. He urged the following reasons against the said order: 1st, that the settlement made with Dulthumun Sing, not having been confirmed by the superior revenue authorities, was invalid, and consequently that the transfer of an invalid title was invalid: 2nd, that even supposing the settlement made with Dulthumun to have been valid, he was not forthcoming: 3d, that the Courts are not authorized to interrupt or restrain a Collector from making a settlement of any estate, which the revenue authorities, on a review of the case, may deem open to resettlement, it being in the power of the party conceiving himself injured to prosecute Government: and lastly, that by such interference, a lawful proprietor may be kept out of his estate, though it may be open to reassessment by the death of the farmer (in the present instance not acknowledged to be such, even if he be alive), and in opposition to the revenue authorities, who, if his claim be just, wish to readmit him; if invalid, to reassess the estate according to its value, and with persons who are forthcoming and responsible.

The Court of Sudder Dewanny Adawlut (present J. Fendall and W. E. Rees), were of opinion that the Courts have no authority to interfere, in a summary manner, in matters relating to settlements, or to pass any orders therein. They therefore reversed the order passed by the Zillah Judge, and confirmed by the Provincial Court, and ordered the Judge of Zillah Juanpoor not to interfere with the proceedings of the Collector in a summary manner.

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JUGGUNNATH PERSHAD SIRCAR, Appellant,
versus

Nov. 16th.

RADHANATH SIRCAR and Others, Respondents.

Execution
of a decree
thirteen
years after
the date
thereof
disallowed.

FROM the proceedings held in this case, it appears that on the 13th of September 1804, a suit was instituted in the Zillah Court of Rajeshahye by Rama Kaunt and Luki Kaunt, whose heirs the respondents are, against the appellant and Dya Ram Sircar, his brother, to obtain possession of a moiety of the villages of Beyldah, Chuk Kudumturee, Chowburia Khord, Chandpoor, &c. (suit laid at 500 rupees), and that a decree was obtained in favour of the plaintiffs, on the 18th of January 1805. In A. D. 1817, the plaintiff sued out execution thereof, and the Zillah Judge of Rajeshahye immediately ordered that the decree should be carried into execution.

The appellant, on hearing of this order, presented a petition to the Zillah Judge, praying him to stay the execution of the decree, alleging that the decree of the 18th of January 1805, was founded on a *soolehnama*, or deed of compromise, purporting to be the deed of both parties, filed by the plaintiffs, which he (the appellant) denied ever to have executed, and which he stated to have been forged by the opposite party: in corroboration of which, he urged the precipitancy with which the suit had been hurried through the Court, it having been decided in less than five months from the date of the institution thereof. He also pleaded that the Judge, who passed the decree in A. D. 1805, did not call upon him and his brother to enquire whether they acknowledged the *soolehnama*, as, in justice to them, he ought to have done. On receiving the appellant's petition the Judge directed the *moonsiff* to make a summary enquiry into the case in the *mofussil*. The *moonsiff* having made a report favourable to the respondents, the appellant objected to it, asserting that the *moonsiff* had leagued with the respondents, and had made a false report. The Judge, however, considering his objections frivolous and vexatious, levied from him a fine of 50 rupees, and on the 26th of September 1817, ordered that the decree should be carried into execution. The appellant preferred an appeal from this order to the Provincial Court of Moorshedabad, by which Court the order of the Zillah Judge was confirmed on the 30th of July 1818. On this he appealed to the Court of Sudder Dewanny Adawlut.

That Court having admitted his appeal, he pleaded: 1st, that he never heard of the institution of the suit, in which the decree, now ordered to be carried into execution, was passed, nor of the *soolehnama*, on which that decree was founded, till he heard that an order had been passed for the execution of the decree; and that the Judge of the Zillah Court, who passed the decree, previously to admitting the *soolehnama*, should have called upon him and his brother, to ascertain from them, whether or not they acknowledged it: 2nd, that he, from the date of the decree to the present time had held undisturbed possession of the lands affected by it: 3d, that the Zillah Judge had acted in opposition to the provisions of the eighth clause of section 15, regulation 26, of

1814, in carrying the decree into execution without having first called upon the opposite party to appear, and state any objections they might have to urge against the execution thereof: and lastly, that the Court of Sudder Dewanny Adawlut had decided in the case of Mirza Husun Ali *versus* Mirza Shureef and others (*vide* vol. 1, page 317), that a decree passed more than twelve years previously to execution being sued, could not be carried into execution. 1818.
Juggunnath
Pershad
Sircar, v.
Raduanath
Sircar and
others.

The Court (present J. Fendall and W. E. Rees) after considering the whole of the proceedings of the case, observed that it appeared that the decree, of which execution was now sued, was founded on a *soolehnama*, which was denied by the appellant, and that as the decree had not been carried into execution for so long a period (upwards of thirteen years), from the date thereof, it was neither just, nor agreeable to the practice of the Courts, to carry it into execution; that even if the respondents had been put in possession of the lands under this decree (as asserted by them), and had been dispossessed by the appellant, the Judge should not have carried the decree into execution a second time, but should have referred the party to a new Dewanny suit. They therefore, on the 16th of November 1818, reversed the orders of the Zillah and Provincial Courts, and ordered that the appellant should be reinstated in the lands, leaving it to the respondents to institute a fresh suit to establish their claim thereto under the *soolehnama*, if they thought proper. They also directed the Zillah Judge to repay to the appellant the fine of 50 rupees levied from him.

GOUR SIRDAR (Son and heir of NUNDUN SIRDAR), Appellant, 1818.

versus

GOPEE DUTT (for himself, and as heir of his deceased brother, SHAM DUTT), Respondent. Nov. 30th.

THIS suit was instituted in the City Court of Dacca by Nundun A. by mis-Sirdar, the father of the appellant, on the 2nd of July 1816, to recover from Sham Dutt and Gopee Dutt, the defendants, the sum of 1,600 rupees, under the following circumstances. The plaintiff carried on business at Dacca, under the name of Nundun Sirdar and Jewun Sirdar. His *gomashta* in Calcutta purchased for him two Government promissory notes: viz No 6,475 for 500 rupees, dated 5th of July 1805, and No. 7,010 for 2,000 rupees, dated 11th of July 1805, from Ram Mohun Lal, and transmitted them to him. Wishing to dispose of the note for 500 rupees, he employed Anund Lal, a broker, to negotiate the sale. The broker applied to the defendants, Sham Dutt and Gopee Dutt, who agreed to purchase the note for 481 rupees, 8 anas. The plaintiff agreed to these terms, but being unable to read English, he, by mistake, sent the note for 2,000 rupees to the defendants by his son, Gour Sirdar. The plaintiff's son wished the defendant, note to C, take, hav-
ing sold to
B a pro-
missory
note for
2,000 ru-
pees, in-
stead of
one for 500
rupees,
sued him
to recover
the diffe-
rence be-
tween the
two notes.
B, having
sent the

1818. Sham Dutt, to get some one to read the note, but he (Sham Dutt) saying that that was unnecessary, paid the purchase money, and the note was endorsed to the defendants by Gour Sirdar, in the plaintiff's name. The plaintiff shortly after wishing to dispose of the note for 200 rupees, was about to send it to Calcutta, but previously to sending it, shewed the remaining note to a person who could read English, when he was informed of his mistake. He applied to the defendants, demanding the difference between the two notes, and as they put him off from time to time with various excuses, he instituted the present action to recover the sum of 1,500 rupees.

his agent, pleads ignorance of the mistake, and refers A. to C. for the difference. It being proved that A. had no dealings with C, judgment was given against B, leaving him the option of suing C. for the recovery of the difference.

The defendants stated, that they having agreed to purchase the 500 rupee note for 481 rupees, 8 anas, received from Gour Sirdar a note, which he said was for 500 rupees: that as they did not understand English, they wished to send for a person to read the note, but that Gour Sirdar said that it was unnecessary: that they, on this, paid him the sum of 481 rupees, 8 anas, and sent the note to Sree Kishen Thakoor, their agent in Calcutta, to purchase conch shells, and that the said agent having purchased the shells for them, credited them the sum of 500 rupees, as the amount of the note.

The plaintiff filed an attested copy of a Government promissory note, No. 7,010 of 1805-1806, for 2,000 rupees, granted by Government to Odit Churn Deh and Govind Lal, and endorsed by several persons, and among others, by Juggomohun Seel to Ram Mohun Lal, by him to the plaintiff, by the plaintiff to the defendants, and by them to Duljeet Gir. Duljeet Gir being examined, deposed that the note in question was sold to him by Sree Kishen Thakoor, the agent of the defendants, in payment of certain conch shells sold by him to the said Sree Kishen Thakoor on their account.

The Zillah Judge was of opinion, that the evidence of Duljeet Gir and the endorsement on the promissory note fully established the fact of the promissory note for 2,000 rupees having been endorsed by the plaintiff to the defendants; and that as the defendants admitted that they had only paid 481 rupees, 8 anas for it, as a note for 500 rupees, the plaintiff had a right to recover from them the difference between the two notes. Sham Dutt, one of the defendants, having demised, he (the Judge) passed a decision, on the 5th of February 1808, directing that the plaintiff should recover from Gopee Dutt and from the estate of Sham Dutt the sum of 1,500 rupees, being the amount of the difference between the two notes, and the sum of 261 rupees, 8 anas, interest at twelve *per cent* from the date of the institution of the suit to the date of the decree. He further declared, that the defendants were at liberty to sue their agent, Sree Kishen Thakoor, for the recovery of the sum decreed against them if he had defrauded them.

Gopee Dutt being dissatisfied with this decree, appealed to the Provincial Court of Dacca, on his own behalf, and as heir to his deceased brother Sham Dutt. He pleaded, that Sree Kishen Thakoor was not their servant, and that they, consequently, were not answerable for his acts: that he, Gopee Dutt, had sent the note, as a note for 500 rupees, to Sree Kishen Tha-

Koor, who acknowledged the receipt of 500 rupees in a letter which he (appellant) could produce. The respondent pleaded, that he had no dealings with Sree Kishen Thakoor: that he dealt with the appellant, who was the responsible person, and that the appellant might settle the affair as he thought proper with his agent.

1818.

Gour Sirdar, v. Gour Sirdar.

The Provincial Court considered the decree of the Zillah Court improper. They were of opinion that no fraud was proved against the appellant and his brother (Sham Dutt, deceased), though they had acted foolishly and imprudently in taking the note without ascertaining that it was correct: that it was proved by an original letter from them to Sree Kishen Thakoor, dated 26th *Kartick* 1212. B. S., bearing the Dacca postmark of the 10th of November 1805, that the defendants dispatched the note, as one for 500 rupees, to Sree Kishen Thakoor; and by another original letter, dated 3d *Ughun* 1212, B. S., bearing the Calcutta postmark of the 14th of November, that Sree Kishen Thakoor acknowledged the receipt of a note of 500 rupees: that in the account current, furnished by Sree Kishen Thakoor to the defendants, he had credited them the sum of 500 rupees in that account current, as the price of conch shells purchased by him on their account: that Sree Kishen Thakoor was not the agent of the defendants alone, but the common agent of the *sunkarees*, or dealers in conch shells, of Dacca, and that he had in the presence of the parties and of many witnesses acknowledged the receipt of 500 rupees from the defendants. The Court, therefore, on the 6th of May 1813, passed an order reversing the Zillah decree, and leaving the respondent the option of suing Sree Kishen Thakoor for the amount of the difference between the two notes. The costs were made payable by the respondent.

The respondent presented a petition to the Court of Sudder Dewanny Adawlut for the admission of a special appeal. The Court, on consideration of the circumstances of the case, thought proper to admit a special appeal. The appellant (plaintiff in the Zillah, and respondent in the Provincial Court), pleaded that it was clearly established, that the defendants had endorsed the note for 2,000 rupees in their own names, and that it was sold by Sree Kishen Thakoor for 2,000 rupees to Duljeet Gir on their own account: that, however that might be, that he had no dealings with Sree Kishen Thakoor, and that the defendants alone were answerable to him.

The appellant demising at this stage of the proceedings, his son Gour Sirdar carried on the appeal.

The Court (present J. Fendall and G. Oswald), after maturely weighing the whole of the evidence, were of opinion that the defendants had not acted honestly in this transaction: as it was proved by the evidence that the note was sold to Duljeet Gir by the agent of the defendants, and that they had received from him, Sree Kishen Thakoor, in cash and goods, the full amount of the note, and that when they were called upon by the plaintiff to remedy the mistake which had occurred, they had put him off, from time to time, with various frivolous excuses; and that as it was clearly proved that the plaintiff did, by mistake, sell to the

1818. Gour Sir-
dar, v. Go-
pee Dutt. respondents a note of 2,000 rupees for one of 500 rupees, he was entitled to recover from them the amount of the difference between the two notes. A final order was therefore passed on the 30th of November 1818, reversing the decree of the Provincial Court, and confirming that passed by the Zillah Judge. The respondent was directed to pay to the appellant the sum of 1,500 rupees with interest, and was informed that he was at liberty, if he thought proper, to institute a suit against Sree Kishen Thakoor to recover the sum which he (respondent) was ordered to pay to the appellant. The costs of all the Courts were charged to the respondent.

MIRZA KUREEMOOLLA BEG, Appellant,
versus
BABOO HURRUCK CHUND, Respondent.

The Civil Courts have no authority to annul by a summary order, a public sale of lands made by a Collector. ON the 29th of January 1816, a decree was obtained by the respondent in the City Court of Benares, for the sum of 1,833 rupees, 13 anas, against Mussumnaut Pear Beebee and Peer Bukhsh, heirs of Moohummud Syud, and Gholam Nujuf. In execution of this decree, a four anna share of mouza Bansul, a *maafee* village situate in pergunna Doosch, was directed to be sold by public auction. The said share was accordingly sold by the Collector on the 30th of November 1818, and purchased for the sum of 250 rupees, by Mirza Kureemoolla Beg. The respondent, on the 4th of December 1818, presented a petition to the Judge of the City Court of Benares, praying that the sale might be set aside. He pleaded the inadequacy of the price, the said share having been mortgaged to him for 1,000 rupees; and the irregularity of the sale, the sale having taken place within the period of one month from the date of the issue of the proclamation of sale, contrary to the provisions of regulation 20, 1795.

The Judge of the City Court, on the same date, passed an order directing the Collector to consider the sale of the share in question annulled, and to issue a further proclamation for the sale thereof after the expiration of one month from the date on which the proclamation should be issued, and to sell the same at the expiration of that period, in the event of no further orders being received from the Court.

The auction purchaser appealed from this summary order to the Provincial Court of Benares. He stated, that the said four anna share of the village in question, the annual *jumma* of which was 62 rupees, 8 anas, was put up for sale, after the prescribed proclamation had been issued, by the Collector, in the presence of the agent of the decree holder on the 30th of November 1818: that as some doubts were entertained of the validity of the *maafee* tenure of the village, few persons were willing to bid for it: that the agent of the decree holder bid against him, till the share in question was at length knocked down to him for 250 rupees: that he imme-

diately paid the earnest money, and the sale was reported by the Collector for the approval of the Board of Revenue, and that the decree holder made no objection to the sale, till the doubts which existed as to the validity of the *maafee* tenure had been removed by the sanction of the Board. He pleaded that inadequacy of price was not a sufficient ground to annul the sale, and could not be urged by the decree holder, as his agent was present, and might have purchased the estate if he had thought fit, and that the proclamation had been duly issued. He therefore prayed, that as the *maafeedurs* had not objected to the sale, the summary order of the City Judge might be reversed, and that any party who was dissatisfied with the sale might bring forward his objections in a regular suit.

1819.

Mirza
Kureem-
oolia Beg,
v. Baboo
Hurruk
Chund.

The Officiating Judge of the Provincial Court, considering the order of the Judge of the City Court to be perfectly correct, confirmed it on the 14th of December 1818. The appellant being still dissatisfied, appealed to the Sudder Dewanny Adawlut.

That Court (present J. H. Harington and W. E. Rees) being of opinion, that under the regulations in force, the Civil Courts have no authority to annul, by a summary judgment, a public sale made by a Collector, issued a final order, on the 8th of January 1819, reversing the orders of the inferior Courts, and directed the Judge of the City Court to stop the further sale of the share in question, and to put the auction purchaser in possession, leaving the party who might be dissatisfied with the sale to institute a regular civil action.

MESSRS. FAIRLIE, FERGUSON AND CO. and HURRUCK
CHUND DOWKUR, Appellants,

1819.

versus

MAHEH RAM CHOWDRY, Respondent.

Jan. 18th.

THE respondent (original plaintiff), instituted the present ac-A claim to
tion in the Provincial Court of Moorshedabad on the 14th of May certain vil-
1810, to recover from Hurruk Chund Dowkur and others, lages made
defendants, the villages of Goalpara, &c. nine villages, which he by A.
claimed as part of his zemindaree, and to recover the sum of 5,501 against B,
rupees, as the mesne profits during the time they had possession. and the
The facts of the case, as stated in the plaint, are as follow : heirs of C,
adjudged in
favour of

Goalpara and the other villages formed part of the zemindaree of Reyna Ram Chowdry, the father of the plaintiff, which was termed A, it ap-
pergunna Myspareh, Deh Petumpoor, the *top khaneh mehals* of the claim of
zillah Rungpoor. In the year 1179, B. S. (A. D. 1772), the villages B, and C.
in question were mortgaged by Reyna Ram to Mr. Daniel Raush, to the lands
who resided at Goalpara for commercial purposes. The debt to rested on
Mr. Raush and arrears of Government revenue, &c. soon amount- deeds of
ing to 22,000 rupees, that gentleman compelled Reyna Ram sale which
Chowdry to mortgage the whole of his zemindaree, including the to be the-

1819. villages in question, for that sum, and took possession of the whole. He, at the same time, compelled Reyna Ram Chowdry to grant him a farm of Goalpara, &c. in the name of his *gomashta*, Ram Soonder Ghose, at a *jumma* of 101 Nurainee rupees. When, after some time, Reyna Ram thought that the money advanced on the mortgage must have been paid off from the produce of the zemindaree, he applied to the Judge of Cooch Behar, in order to get possession of the estate, but that gentleman paid no attention to his application. Shortly after this he died, leaving the plaintiff, his son, a minor. On this Mr. Raush seized and confined the plaintiff, and his grandmother, and in the year 1197, B. S. (A. D. 1790-91) had Goalpara, &c. the nine villages in question, entered in the books of the Collector's office, as the talook of Ram Soonder Ghose, at a *jumma* of 57 rupees, 2 anas, 8 cowries, and the rest of the pergunna entered as the zemindaree of the plaintiff, and caused Sham Ram Sein, a dependant of Mr. Raush, to be appointed guardian of his person and manager of his zemindaree, thereby retaining possession of the whole estate. In 1189, B. S. (A. D. 1782-83), Mr. John Lumsden, the Acting Judge of Zillah Cooch Behar, released the plaintiff from confinement, and appointed Sham Ram Ghose his guardian and manager of his estate. In 1199, B. S., (A. D. 1792-93), the plaintiff received a *perwanna* to enter into engagements for his zemindaree direct with Government, and got possession of the whole thereof, including Goalpara, and paid the revenue assessed thereon to Government. In 1200, B. S. (A. D. 1793-94), Mr. Raush claimed from plaintiff the sum of 77,620 rupees, 7 anas, 8 gundas, as the balance due on the mortgage aforesaid, and confined him, and made him execute a fresh bond, remortgaging the zemindaree for that sum, and after having taken possession thereof and appointed Jugunt Ram Seima *serberakar*, released the plaintiff. Mr. Raush having died, the estate after successive sales came into the hands of Mr. Mac Cullum. In 1205, B. S. (A. D. 1798-99), the commissioner of Cooch Behar, at the instance of the plaintiff, reported the circumstances of the case to the Board of Revenue. An order was received from the Board, stating that Europeans were prohibited under the orders of Government from holding land, and directing that the land should be sold. It was accordingly purchased by the plaintiff for 15,000 rupees. In 1208, B. S. (A. D. 1801-2), the plaintiff got possession of the whole of the zemindaree, with the exception of the villages in question, which Mr. Mac Cullum refused to give up, on the plea that they had been purchased by Ram Soonder Ghose. On his death, Mr. James Fulton obtained possession of his property and the villages in question: and the plaintiff applying to the Zillah Court of Rungpoor, was referred to the Collector. On the death of Mr. James Fulton, the plaintiff got possession of the villages in question; but Mr. Robert Fulton, as heir to his brother, executed a deed selling the villages to Hurruck Chund Dowkur, and Sudda Ram Dowkur, and caused Doorga-pershad, who called himself heir of Ram Soonder Ghose, to present a *kharynameh* to the Collector, praying that the villages, the purchased property of Ram Soonder Ghose, might be entered as the purchased talook of Hurruck Chund Dowkur and Sudda Ram,

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much as
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of section
3, regula-
tion 38,
1793,
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hibits
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give a title
to the vil-
lages in
question.

Dowkur. The villages were accordingly entered in the Collector's books as the talook of those persons. As the plaintiff held the original transfer of the villages in question to be forced and fraudulent, he sued Hurruck Chund, and the heirs of Sudda Ram deceased, the purchasers, Petumber Mujmoodar, the person who had possession of the villages on behalf of the said purchasers, and Doorga-pershad Ghose, heir of Ram Soonder Ghose, whose name had, as before related, been entered in the Collector's books as talookdar, to recover possession of the villages, and the mesne profits thereof for the time he had thus fraudulently been dispossessed.

1819.

Messrs. Fairlie, Fergusson and Co. and Hurruck Chund Dowkur, v. Mahesh Ram Chowdry.

The counter statement of Hurruck Chund Dowkur, the purchaser, was as follows:

About 40 years previous to the institution of the present suit, Reyna Ram Chowdry, the former zemindar, sold the villages in question, which had been entered in the Collector's books at the decennial settlement, separately from the zemindaree of Mysparah, as the talook of Goalpara, to Mr. Hugh Bayley, by whom the revenue due to Government was paid. After his death, the talook of Goalpara was held by Mr. David Killican, and after his death, sold by Mr. Thomas Graham and Mudun Mohun Dutt, administrators to his estate, for 20,000 arcot rupees, to Mr. Daniel Raush, by a deed of sale in the English language, dated the 3d of September 1786, under the name of Ram Soonder Ghose, his *gomashta*, whose name was entered in the Collector's books as talookdar. Mr. D. Raush held possession of the talook for 28 years, receiving the profits, and paying the revenue assessed thereon to Government. On his death, the talook was sold, under a deed of sale in the English language, dated 2d of March 1796, by his executors, Messrs. Colin Shakespear and Alexander Colvin, for 12,000 rupees, to Mr. Bernard Mac Cullum. After retaining possession for some time, he died, and the estate was sold by his executors, Messrs. Fairlie, Gilmore and Co. to Messrs. James Fulton and Henry Charles Gilmore, who had possession. After the death of Mr. H. C. Gilmore, Mr. James Fulton retained possession till his death, when his brother, Mr. Robert Fulton, as his executor, and Messrs. Fairlie, Gilmore and Company (the former transfer by them to Messrs. J. Fulton and H. C. Gilmore not having been quite completed), made over their right and title in the talook to Hurruck Chund Dowkur and Sudda Ram Dowkur, and executed a joint deed of sale in the English language, dated 21st of March 1809. They caused the heir of Ram Soonder Ghose, whose name during the whole of these transfers had remained in the Collector's books, as talookdar, to present a *kharijnama*, or petition praying that his name might be erased from the books, and that the names of Hurruck Chund Dowkur and Sudda Ram Dowkur might be entered, as talookdars by purchase. A report having been made to the Board of Revenue, the transfer was sanctioned, and the estate entered as the talook of the purchasers aforesaid, who had ever since had undisturbed possession thereof. The defendant aforesaid pleaded that the cognizance of the suit was barred by the number of years which had elapsed since the original purchase, and the successive transfers of the estate through so many hands.

Petumber Mujmoodar stated, that he had no interest in the

1819. talook, he being merely the *gomashla* of the purchasers. Doorga Ram Ghose stated that his father, Ram Soonder Ghose, had no interest in the estate, except as nominal talookdar, his name having been entered in the Collector's books to enable Mr. D. Raush to hold the talook; that his name had been continued in the Collector's books as talookdar under the successive purchasers, and on the sale of the estate to the last purchasers, he, as heir to his deceased father, had presented a *kharijnama* to the purport stated by Hurruck Chund Dowkur.

Messrs. Fairlie, Fergusson and Co. and Hurruck Chund Dowkur, v. Maheh Ram Chowdry.

The parties filed many documents in support of their claims, and the case came to a final hearing on the 21st of March 1814, before Mr. T. Brooke, Senior Judge of the Provincial Court, who passed the following decision :

He observed, that Hurruck Chund Dowkur, the defendant, had produced no deed of sale executed by Reyna Ram, the former zemindar, and that the several deeds filed by him did not define the villages comprised in the talook of Goalpara, and that though the villages claimed were enumerated by name in a mortgage bond executed on the 14th of April 1789, by Mr. Daniel Raush in favour of Messrs. Colvin and Company, yet the said mortgage bond did not state how the talook had been acquired from the former zemindar. As therefore the deed of sale, under which Hurruck Chund claimed the talook, merely purported to sell to him and Sudda Ram the factory of Goalpara and the buildings, bullock sheds, &c. appertaining thereto, he (the Senior Judge) did not consider that it was sufficiently correct to uphold a claim to the villages in question. He also observed, that the orders of the Governor General in Council, under date the 8th of June 1787, which were embodied in regulation 38, 1793, prohibited Europeans from holding lands without having obtained the previous sanction of the Governor General in Council, and that this permission did not appear to have been obtained in the present instance. Under these circumstances, he passed a decision in favour of the plaintiff, decreeing to him possession of the villages of Goalpara, &c. claimed by him, with the exception of the factory of Goalpara, the building, bullock sheds, &c. enumerated in the deed of sale by Messrs. Fairlie, Gilmore and Company, and Mr. Robert Fulton. As the talook had passed through so many hands, it was impossible to get at any true account of the mesne profits of the villages, during the period they had been in the hands of Mr. Baxev and the succeeding purchasers; the claim therefore of the plaintiffs to mesne profits was dismissed, and the costs made payable by the parties respectively.

A petition having been presented to the Court of Sudder Dewanny Adawlut by the firm of Messrs. Fairlie, Gilmore and Company, under the name of Messrs Fairlie, Fergusson and Company, praying to be heard against the decision of the Provincial Court, their prayer was acceded to, and they carried on the appeal in conjunction with Hurruck Chund, defendant, who had appealed from the above decision. They pleaded that the cognizance of the suit was barred under the rule of limitations, the talook in question having been in the possession of successive purchasers for 40 years previous to the institution of the suit;

and that the talook of Goalpara was distinctly named in the *Kubalehs*, and that the witnesses of the respondent in another suit (the case of Rangaghur), had deposed that the talook was sold by Reyna Ram Chowdry in the year 1179, B. S. (A. D. 1793)

The respondent pleaded that the villages in question were merely mortgaged by his father, and that the witnesses in the Rangaghur case were villagers, who knew not the difference between a mortgage and a sale, seeing that the mortgagee had possession of the property. He also pleaded that the circumstances of the case rendered the suit cognizable, notwithstanding the lapse of so many years.

The appellants filed a *Muhzurnama* dated 30th of July 1787, in proof of the sale of the talook by Reyna Ram Chowdry to Mr. D. Raush, in the year 1183, B. S. (A. D. 1777.) This document was signed by several zemindars (Chowdrys) and by the *canoongoe* of the pergunna.

The Court (present W. Blunt, Officiating Judge) having perused the papers of the case, and the several documents filed by the parties, saw no reason to alter the decision of the Provincial Court. It appeared to the Court that the *Muhzurnama* and the original answer of Hurruck Chund were at variance, inasmuch as the answer stated that the talook, having been originally purchased by Mr. Hugh Bayley, had passed through two or three hands before it became the property of Mr. D. Raush, and the *Muhzurnama* set forth that it was sold by Reyna Ram to Mr. D. Raush; that it did not appear how and when the talook of Goalpara was separated from the zemindaree of pergunna Myspara, and that the deeds filed by the defendant, Hurruck Chund, were too vague to support a claim to the villages in question, "the estate of Goalpara" being stated to be the property which was thereby sold, and that the order of Council dated 8th of June 1787, prohibited Europeans from holding lands. The Court therefore passed a final order on the 18th of January 1819, confirming the decision of the Provincial Court, and dismissing the appeal with costs payable by the appellants.

1819.

MUSSUMMAUT ABEA and MUSSUMMAUT CHUNDER
MALA, Appellants,

April 2nd.

versus

ESUR CHUND GUNGOLÉE (Minor, through his Guardian
BULRAM GUNGOLÉE), Respondent.

A Hindoo widow executes a testamentary deed of gift of pergunna on the 10th of July 1814, by Mussummaut Ram Piria, to recover from Mussummaut Abea and Mussummaut Chunder Mala, a share in favour of Backergunge. Suit laid at 400 rupees.

It was stated in the plaint, that a four ana share of pergunna Ourungpoor Rogonathpoor, and Tuppeh Etimadpoor was entered in the Collector's books as the property of Mukoond Deo Itai Chowdry, that of this four ana share, one-third (or 1 ana, 6 gundas, 2 cowries, and 2 krants of the whole estate,) fell to his son Munohur Rai Chowdry, and that after his death, his widow Mussummaut Luki Piria succeeded to his share: that Mussummaut Luki Piria having four daughters, viz Mussummaut Abea, Mussummaut Opoorbeh, mother of the plaintiff, Mussummaut Chunder Mala, and Mussummaut Pran Piria, all of whom were married, executed a *dan putr*, or deed of gift, making over to them equal shares of the estate left by her husband; and that the husbands of the four daughters entered into a counterpart agreement to pay in equal shares any debt which might be due against the estate; that they each received their share of the profits of the estate during the life of Mussummaut Luki Piria, that the plaintiff's father and mother dying in 1203, B. S., she resided with her grandmother and the defendants, till the death of the former, which occurred in the year 1207, B. S., that in the year 1210, B. S., the defendants turned her out of the joint dwelling house, and refused to give her the share of the profits to which she was entitled in right of her mother. She therefore instituted this action to obtain possession of one fourth of the (1 ana, 6 gundas, 2 cowries, 2 krants) share of the estate which was left by Luki Piria, or a 6 gunda, 2 cowry, 2 krant share of the whole zemindaree. The *Mofussil* produce of the share claimed was estimated at 400 rupees *per annum*.

The defendants denied that the plaintiff had any claim to share in the property left by Mussummaut Luki Piria. They stated that in the year 1201, B. S., Mussummaut Luki Piria executed an *Ikrari dan-putr*, or conditional deed of gift, which provided, "that during her lifetime, the share which she received at the death of her husband should, according to former usage, be managed by Huri Kishen Chatterjee, perpetual *gomashita*, and that in case the said *gomashita* should at any time be unable to pay the revenue due to Government, and debts due by the estate from the proceeds thereof, the husbands of her four daughters should contribute in equal parts to pay the said revenue and debts, and that after her death the estate should be equally divided between the four daughters;" that she did not deliver this deed, but retained it in her own possession: that in the year 1203, B. S., the estate fell

in arrears, and as the husbands of the daughters did not come forward, and pay the arrears, according to the conditions of the *dan-putr*, 8 anas of the share in question were sold by public auction, and that in 1205, B. S., another ana share was sold, but that Mussummaut Luki Piria repurchased the said 9 ana share from the auction purchaser: that two of her daughters, viz. Mussummaut Opoorbeh, the mother of the plaintiff, and Mussummaut Pran Piria, dying during her lifetime in 1203, B. S., she executed a second deed of gift, cancelling the former deed (which the defendants pleaded had become invalid from one of the parties not having fulfilled the conditions thereof,) and giving the whole of the share to her surviving daughters, the defendants; that she died in *Kartik* 1207, B. S., since which time they, the defendants, had retained possession of the share in question. They stated that the plaintiff's mother having died before Mussummaut Luki Piria, she (plaintiff) could not claim any share, her mother never having been seized therein, and that she (plaintiff) never had had possession, or received any share of the profits of the share in her own right, but being left an orphan, they took compassion on her, and received her into their house, and defrayed the expences of her marriage. The plaintiff filed among other documents the deed of gift and the counterpart agreement alluded to in the plaint. The deed of gift was dated 21st *Chey* 1201, and was in purport exactly similar to the one quoted in the answer of the defendants. The Judge of the Zillah Court put the following question to the pundit:

"If the mother of the plaintiff died during the lifetime of her mother (Luki Piria) who, under the *dan-putr*, is entitled to her share?" The pundit answered in the following terms, "If the mother (Luki Piria) executed a deed, making over the real property which she received from her husband to her four daughters, and if the deed were so worded as to give, in addition to the property named therein, any other property she might subsequently acquire, and if it be stated that the donees shall obtain the property after the death of the donor, the daughters have no right in the property during the lifetime of the mother. If one of the daughters die before the mother, her daughter has no claim to the property." The Zillah Judge being of opinion that the claim of the plaintiff was completely barred by this *vyuvustha*, dismissed the suit with costs.

The plaintiff being dissatisfied with this decision, appealed to the Provincial Court of Dacca. She requested that the same question, which was put to the pundit of the Zillah Court, might be put to the pundit of the Provincial Court. The appeal was defended by Mussummaut Chunder Mala on the same grounds as those on which she resisted the original claim, but a claim to the whole estate left by Munohur Rai Chowdry, being set up by his grandson Sumboo Nath Mokerjee, son of Mussummaut Abea, who denied the right of Mussummaut Luki Piria to alienate the estate, Mussummaut Abea acknowledged his right, alleging that the answer filed in her name in the Zillah Court had been given without her knowledge. The Court referred him to a separate suit for the adjustment of his claim, declaring that the decision in this case would not affect his right, and proceeded to consider the merits of the case as far as related to the claim of the plaintiff.

1819.

Mussum-
maut Abea
and Mus-
summaut
Chunder
Mala, v.
Esur
Chund
Gungolee.

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Mussum-
maut Abea
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Chunder
Mala, v.
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The above question being put to the Hindoo law officer of the Provincial Court, he answered, that the deed of gift was correct, and that the donor having used the words, *I have given*, had no power to retract the gift, and that if Mussummaut Oopoorbeh, the mother of the plaintiff, had during the lifetime of Mussummaut Luki Piria, received any share of the profits of the property, which Mussummaut Luki Piria received from her husband, the plaintiff was entitled to the share which was granted to her mother by the *dan putr*.

The Court considered the fact of Mussummaut Oopoorbeh having participated in the profits of the estate under the *dan putr*, to be fully proved by the evidence. They therefore, under the *vyuvustha* of their pundit, considered the right of the plaintiff to a fourth share of the property of Mussummaut Luki Piria to be clearly established, and reversing the decision of the Zillah Judge, directed that she should be put in possession thereof. The costs in both Courts were made chargeable to the defendants, who being dissatisfied with this decision, presented a petition to the Sudder Dewanny Adawlut praying the admission of a special appeal.

The Court, previous to admitting the appeal, consulted their pundits with regard to the Hindoo law as applicable to the case.

Their *vyuvustha* was as follows: "If the donor, Luki Piria, executed a deed bestowing on her four daughters the property left by her husband, to be entered on by them with the power of alienating it, by gift or sale, after her death, and if the permission of the heirs of the husband was not previously obtained, the gift is not valid; and as Mussummaut Oopoorbeh, one of the donees, died during the life of the donor, her right never having been in existence (that is, she never having been seized of the share) her daughter, the plaintiff, cannot claim any share of the property through her." After perusing this *vyuvustha*, the Court admitted a special appeal. Mussummaut Ram Piria having died at this stage of the proceedings, the appeal was defended, on the part of her minor son, Esur Chund Gungolee, by Bulram Gungolee his guardian.

On consideration of all the documents, the Court (present J. Fendall and S. T. Goad), were of opinion that the *dan-putr*, under which Mussummaut Ram Piria claimed a share of the property of Munohur Rai Chowdry, was invalid, and that as the title of Mussummaut Oopoorbeh to the said property had never been completed (from her having died before Luki Piria), Mussummaut Ram Piria, her daughter, who claimed the property through her, had consequently no right thereto. They therefore passed a final decision confirming the decision of the Zillah Court, and dismissing the claim with costs payable by the respondent.

NEEL KAUNT GHOSE and SREE KAUNT GHOSE,
Appellants,
versus
SASSEE MUNNEE DASSEE, (Widow of SUROOP CHUND RAI,
deceased,) Respondent.

1819.
April 9th.

THE appellants instituted a suit in the Provincial Court of The Provincial Moorshedabad on the 8th of August 1811, to recover from Surroop Court have Chund Rai, the defendant, the sum of 27,351 rupees, 14 anas, ing non- the profits of a farm for the year 1214, B. S., with interest sued the thereon. They stated that the Raja of Burdwan had granted to appellants their father, Ram Nidhee Ghose, an *ijara* or farm of the whole for having of pergunna Munohur Shahee, containing 206 mouzas, and sued for only a part mehals on a lease of seven years, from 1210 to 1216, B. S., of their inclusive, at an annual *jumma* of 109,937 rupees, 11 anas, 6 gun- claim, the das; that their father had possession thereof till his death. Sudder De- which took place on the 3d *Jeyt* 1214, B. S.; that on his death wanny Adawlut they, as his heirs, were entitled to possession of the farm, but the allowed a defendants, who had purchased pergunna Munohur Shahee as a summary appeal from this *putnee talook* from the Raja of Burdwan, had dispossessed them from this decision, and had taken the mehals into his own hands. They considered and direct- themselves entitled to the profits of the *ijara* for the three un- ed the Pro- expired years of the lease, viz. 1214, 1215, and 1216, B. S., but vinal Court to being unable to afford to pay at once the institution fee, or rather readmit the the value of the stamp paper necessary in a suit for the whole amount of the profits of the three years, they instituted the present suit, and action to recover from the defendant the sum of 19,537 rupees, the allow the profits of the year 1214, B. S., and 7,814 rupees, 14 anas, interest appellants to pay the thereon from the commencement of 1215 to *Sawun* 1218, B. S., to pay the institution being a period of three years and four months, amounting to 27,451 fee on the rupees, 14 anas, intimating their intention to sue for the profits remainder of the years 1215 and 1216, B. S., when they should have of their claim, and obtained a decree for the sum now sued for. to amend

The defendant objected to their suing for part of their claim, their plaint, leaving the remainder for a separate action. He stated, that on the in conform- death of the father of the plaintiffs, the original farmer, the Raja nity with of Burdwan, issued a proclamation calling on his heirs to furnish section 4, security for the rent of the farm, and on their failing to appear, 4, 1793. regulation sold the pergunna in several lots to Bulbee Kaunt Doss, Kowla Kaunt Kubraj and to himself, as *putnee talooks*.

The Senior Judge of the Provincial Court was of opinion, that the institution of the present action for part of the amount claimed by the plaintiffs to be due to them was irregular, inas- much as it deprived the defendant of the right of appealing to the King in Council, which he would have been entitled to do, had they sued for the whole amount of their claim; that if suitors were in this manner allowed to divide their claims into several suits, they would be able to deprive the opposite party of the right of appealing to the Court of Sudder Dewanny Adawlut and to the King in Council. He therefore nonsuited the plaintiffs, leaving them the option of instituting a fresh action for the full amount of their claim.

1819. The plaintiffs presented a petition to the Court of Sudder Dewanny Adawlut, appealing from this decision. A summary appeal having been admitted, Mussumaut Sassee Munnee Dassee, the widow of the defendant, who had demised, appeared to defend the suit for herself and her minor sons.

Neel Kaunt
Ghose and
Sree Kaunt
Ghose, v.
Sassee
Munnee
Dassee.

The Court (present J. Fendall and S. T. Goad) were of opinion that the Senior Judge of the Provincial Court, previously to nonsuited the plaintiffs, should have given them the option of paying the amount of the stamp duty required to sue for the profits of the years 1215 and 1216, B. S., in conformity with section 4, regulation 4, 1793, and might have nonsuited them in case of their refusing to do so. They therefore, on the 6th of April 1819, passed an order directing the Provincial Court of Moorshedabad to re-admit the suit on their file, and to allow the plaintiffs to pay the institution fee (or stamp duty) for the profits of 1215 and 1216, B. S., and to amend their plaint, and then to try and decide the suit on its merits. The plaintiffs were further informed, that they were at liberty to include in their suit the Raja of Burdwan, who after having granted the farm to their father sold the pergunna as a *putnee talook*. The parties were directed to pay one-fourth of the regular fee to their respective *vakeels*, and three-fourths of the value of the stamp paper on which the petition of appeal was written was returned to the appellants, in conformity with the regulations applicable to such cases.

1819.

DEBEE DUTT (*Mokhtar* of GOOMANI LAL), Appellant,*versus*

April 21st.

THE COLLECTOR OF GORUCKPOOR Respondent.

A Collector declared not authorized to annul a sale of lands, which he considered to have been made under a fictitious name, contrary to the regulations, the power of confiscating in such cases being reserved exclusively to

THE appellant instituted the present action in the Provincial Court of Benares on the 27th of February 1811, against Government, to obtain possession of a talook named Pudrownee, containing 191 villages and 2 chuks, Uslee and Dahilee, situate in pergunnas Sundobeh and Joonea, in zillah Goruckpoor, the annual *jumma* of which amounted to 24,318 rupees.

It was stated in the plaint, that the talook in question, the zemindaree of Ram Nurain and Buhadur Rai, was sold by public auction on the 23d of September 1809, in conformity with a proclamation dated the 28th of July of the same year, for arrears of the public revenue for the year 1216, F. S., and was purchased for the sum of 8,000 rupees by Goomani Lal, who immediately paid the sum of 1,200 rupees, the deposit of 15 per cent required by the regulations, into the treasury, and got a receipt from the treasurer; and on the 29th of September tendered 6,800 rupees, the balance of the purchase money, to the Collector, who refused to receive it, on the plea that the sale had been made under a fictitious name: that on this he (Goomani Lal) deposited the said balance in the Zillah Court, and obtained a receipt for the same, signed by the

Judge: that the Collector having issued a proclamation on the 16th of October 1809, advertising the sale of the talook a second time for the arrears of the revenue of 1216, F. S., due by the former proprietors, Goomani Lal applied to the Judge of the Zillah, who issued a precept, restraining the Collector from putting it up to sale: that the Collector, on the 9th of February 1810, having issued a third proclamation, advertising the talook for sale, in satisfaction of a decree obtained by Bustee Ram *muhajon* against the late proprietors, Goomani Lal appealed to the Board of Commissioners, who ordered the Collector to stop the sale; and by a second order, dated 19th of March 1810, directed him to attach the talook pending the orders of the Governor General in Council: and that a *suzawul* was accordingly appointed to take charge thereof. Goomani Lal having obtained the permission of the Government to try his right to the talook by a regular suit, instituted the present action through the agency of Debee Dutt, his *mokhtar*.

The suit was defended on the part of Government by the Collector of Goruckpoor. He stated, that the former proprietors having fallen in balance for the year 1216, F. S., to the amount of 15,595 rupees, the talook was allotted for sale: that the whole of the balance, with the exception of 6,800 rupees, was paid, but the former proprietors having failed to pay the whole balance, the talook was put up for sale on the 23rd of September 1809, when it was knocked down for 8,000 rupees to a person named Goomani Lal, but that there was every reason to believe that the talook had been purchased under a fictitious name. He stated that this suspicion was founded on the following circumstances: A person named Rama Deen, who resided in the district, on the part of Raja Bheer Kishore, had come to the Cutchery with the intention of purchasing the talook, and on its being knocked down for 8,000 rupees, desired that it might be entered in the name of Cheyt Narain. As Cheyt Narain was not present, a suspicion arose that Cheyt Narain was a fictitious name, and the estate was ordered to be resold. On this Goomani Lal came forward, and declared himself to be the purchaser. On being interrogated, he stated himself to be a resident of Buria Huttee in the pergunna of Sasseram, and a *mohurrir* in the employ of Raja Bheer Kishore. He denied having any connection with Rama Deen or Cheyt Narain, and on Rama Deen waving his claim, the name of Goomani Lal was entered as purchaser; doubts however still remaining in the Collector's mind, that Rama Deen had purchased the talook on behalf of some other person, but as he had no *mokhtarnama*, as required by section 9, regulation 26, 1803, he had allowed the estate to be entered in the name of Goomani Lal; and there being present persons who were willing to give a higher sum for the estate, the Collector wished to put it up for sale a second time, but as the agents of the defaulting proprietors, who were present, promised to pay the arrears in twenty days, the Collector put off the sale, and allowed them twenty days for that purpose, and ordered Goomani Lal to receive back the money deposited: he promised to do so, but half an hour afterwards the *nazir* informed the Collector that he refused to receive it. On being called up and asked the reasons of his refusal, he pretended that he had no

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the Governor General in Council.

1819. one with him who could carry the money to his house. The Collector having again ordered him to take it, he consented and went away. It being however reported to the Collector in the evening that he had again refused to receive the money, the *nazir* and treasurer were sent for, and reported that Goomani Lal had gone from the Cutchery with a man of the treasurer's carrying the bag containing the money, but that on reaching his house, he shut the door in the face of the treasurer's man, and called out to him to take the money back, declaring that he would not receive it. The Collector then desired them to take the money and give it to Goomani Lal in the presence of two or three witnesses. They accordingly placed the money in the house of Goomani Lal, he keeping out of sight, and in the presence of two women, informed his wife that they had done so. The Collector was subsequently informed, that while he was speaking to the *gomashtas* of the defaulting proprietors, regarding the payment of the arrears, Rama Deen deposited the 1,200 rupees with the treasurer, and having got a receipt for the amount, immediately left the Cutchery, and shut himself up in his house, and would allow no one to enter. This he considered as another proof of the fictitious purchase. He therefore considered the sale to have been made in a fictitious name, and consequently illegal, as being contrary to the express provisions of section 9, regulation 26, 1803.

Dabee
Dutt, v.
The Col-
lector of
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poor.

The plaintiff in his reply, denied the fact of the deposit having been made by Rama Deen, and affirmed that he himself had paid the money to the treasurer, and obtained the receipt for the same. He denied having any connection with Rama Deen and Cheyt Narain, and pleaded that he had performed all the necessary conditions of sale, inasmuch as he had paid the deposit of 15 per cent required by the regulations, and on his tender of the balance of the purchase being refused, he had deposited the said balance in Court within the period allowed by the regulations, and that therefore the sale was conclusive and binding.

The Collector in his rejoinder stated, that the sale of a lot was not concluded till, 1st, the purchaser pay the required deposit, and obtain a receipt for the same under the hand and seal of the Collector; 2nd, that the Board of Commissioners, on the receipt of a report of the sale from the Collector, confirm it; and 3d, that after the receipt of the confirmation of the Board, the purchaser receive a *kubala*, or deed of sale from the Collector; neither of which conditions had been conformed to in the present instance.

The plaintiff filed the following documents:

A receipt signed by the treasurer of the Collector's office acknowledging the receipt of 1,200 rupees, deposited by Goomani Lal, dated 23d of September 1809.

A petition presented to the Judge of the Zillah Court, stating that the Collector had refused to receive the balance of the purchase money, and praying that the amount might be received in Court, and that a notice might be served on the Collector, desiring him to receive it.

A receipt for 6,800 rupees under the signature of the Judge and Treasurer, and the seal of the Court, dated 2nd of October 1809.

A *sowal* presented to the Judge, praying that the Collector might

be desired not to sell the talook in question ; with an order of the Judge thereon, desiring the Collector to stop the sale, dated 9th of October 1809. 1819.

The case came on before the Second Judge of the Provincial Court. From the answers to certain queries put by the Court to Debee Dutt it appeared, that Goomani Lal was, till the day of the sale, a servant of Jugroop Sing, *tehsildar*, and that since that time, he had been employed by Raja Bheer Kishore to collect the rents of a talook belonging to him in the Zillah of Chuppra, on a salary of two rupees per month. The Second Judge was of opinion that the circumstances which occurred on the day of sale, the fact of Goomani Lal having immediately been entertained by Bheer Kishore, with whom he had, previously to the sale, no connection, and the apparent circumstances in life of the said Goomani Lal, which did not warrant the conclusion that he could pay 8,000 rupees, and the costs of suit in which the action was laid at 25,000 rupees, afforded strong grounds for the presumption that the purchase was effected under a fictitious name, the real purchaser being Raja Bheer Kishore. He was of opinion that the deposit had been paid in an underhand manner, and that the receipt, which had been granted by the treasurer, having been given without orders from the Collector, and not having been confirmed by his official seal and signature, was not binding, and that the subsequent deposit of the balance of the purchase money in the Zillah Court was consequently of no avail. He therefore passed a decree dismissing the claim of the plaintiff to the talook in question, and ordered that the purchase money should be restored him by the Zillah Judge after deducting the costs of suit, which were made chargeable to him.

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poor.

An appeal having been preferred from this decision to the Sudder Dewanny Adawlut, the same arguments were brought forward in support and refutation of the claim, as had been urged in the Provincial Court.

The Court (present J. Fendall and S. T. Goad) on consideration of the circumstances of the case, did not think that they warranted the conclusion drawn from them by the Collector; viz, that the purchase had been made in a fictitious name. On the contrary, they were of opinion, that it was satisfactorily proved that the talook had been purchased by Goomani Lal in his own name, and that his name had been entered in the Collector's books as purchaser; that he had paid the deposit of 15 *per cent*, and had proved the tender of the balance of the purchase money, and that the sale had been confirmed by the Board of Revenue. They observed, that even in the event of the purchase having really been made in a fictitious name, the Collector had no authority to declare the sale void: that on proof of such fictitious sale, it was incumbent on him to have reported the circumstance for the information of the Governor General in Council, who was at liberty, under section 9, regulation 26, of 1803, to confiscate the lands, or to levy such penalty from the fraudulent purchaser, as he might think proper. They therefore passed a final order reversing the decree of the Provincial Court, and ordered that the appellant should be put in possession of the talook, and that Government should pay to

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poor.

him the net profits of the talook, after deducting the public revenue and the expenses of collection, from the date of the sale, to the date on which he might be put in possession thereof. The Collector was also ordered to pay the costs of suit in both Courts, and to receive the amount deposited by the appellant in the Zillah Court. (a)

1819.

MUSSUMMAUT NUND KOOR BEEBEE, Appellant,

versus

May 7th.

BHEER KISHORE MHYTEE, Respondent.

The Pro-
vincial
Court hav-
ing rejected
a petition
of appeal
on the
ground of
the period
allowed for
appealing
having
elapsed,
without
enquiring
into the
pleas ex-
planatory
of the
delay, the
Sudder
Dewanny
Adawlut,
on a sum-
mary ap-
peal, or-
dered that
Court to
enquire
into the
truth of the
statement
of the
appellants
previous to
rejecting
the appeal.

THIS was a summary appeal, admitted under the second clause of section 3, regulation 26, 1814, from an order of the Provincial Court of Calcutta, rejecting a petition of appeal preferred to that Court against a decision passed by the Judge of Zillah Midnapoor.

It was stated by the appellant, in her petition to the Court of Sudder Dewanny Adawlut, that the decision, from which she wished to appeal, was passed by the Judge of Zillah Midnapoor, on the 28th of July 1818, and awarded to Bheer Kishore Mhytee, the respondent, possession of 25 beegas of *dewutter* land, stated by him to have been purchased from her husband by Lukhee Churn Mhytee, his father: that one month and four days still remained of the period allowed for the admission of appeals, when the Civil Court was closed for the *dussara* and *mohurrun* vacations, and did not resume its sittings till the 16th of November 1818: that on the 30th of that month, Hurchunder, her *Mokhtar*, having presented the stamp paper for the copy of the decree, obtained the copy on the 4th of December: that he (the said *Mokhtar*) sent the decree to Doolubh Chund, her *Naib*, in order that he might consider the propriety of appealing therefrom, and report the same to her: that the *Naib* died on the 12th *Poos* 1226, *Umlee* (corresponding with the 25th of December 1818), without having mentioned this circumstance to her: that she was ignorant thereof till her *Mokhtar* came, and reported the circumstances of the case to her in the month of *Magh* 1226 *Umlee*: that she caused the papers of her deceased *Naib* to be searched, and finding the copy of the decree, dispatched her *Mokhtar* to Midnapoor to prefer a petition of appeal: that a petition of appeal, wherein the causes of delay were explained, was drawn up on stamp paper and

(a) After the Court of Sudder Dewanny Adawlut had, on the motion of Goomani Lal, issued orders for the execution of their decree, Ram Narain Rai and Buhadur Rai, the former proprietors of the village in question (on account of whose default it was sold) petitioned the Court to stay execution till they should institute a suit to set aside the sale as irregular. The Court did not think fit to comply with their request, and Goomani Lal was put in possession of the village. The petitioners were, however, informed that they were at liberty to sue for the reversal of the sale if they thought proper. They accordingly instituted a suit for that purpose against Government and the auction purchaser, in the Provincial Court of Benares, where it is still pending.

signed by her *vakeels* on the 17th of January 1819, but was not presented, as the Zillah Judge did not hold a sitting for transacting miscellaneous business, till the period during which he was authorized to receive petitions of appeal had elapsed: that a petition of appeal, detailing the circumstances above stated, was presented to the Provincial Court of Calcutta, but that the Officiating Judge of the Court rejected the petition on the 19th of April 1819, without enquiring into the truth of the facts stated by her, as explanatory of the delay. She therefore appealed to the Court of Sudder Dewanny Adawlut, praying the Court to take the facts stated into consideration, and not to allow her, who, being a female of rank, was precluded by the customs of the country from taking an active part in the management of her own concerns, to be deprived of her just rights by the negligence of her servants.

1819.

Mussum-
mant Nund
Koor Bee-
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Bheer Ki-
shore
Mhytee.

It appeared from the copy of the proceedings of the Officiating Judge of the Provincial Court, under date the 17th of April 1819, that two months and fifteen days had elapsed between the 17th of January 1819, when the petition intended to be presented to the Zillah Judge was prepared and signed by the *vakeels*, and the day on which the petition of appeal was presented to the Provincial Court: and that the Officiating Judge considered this a sufficient ground for rejecting the petition, without making any further enquiry, and rejected it accordingly.

The Court (present W. E. Rees and S. T. Goad) on consideration of the circumstances of the case, were of opinion that the appellant was entitled to be heard, and to have her pleas investigated. They therefore, on the 7th of May 1819, directed the Provincial Court to cause the *Mokhtar* of the appellant, and the *vakeels* who were employed by her in the Zillah Court, to be examined on oath as to the truth of the facts alleged by the appellant, and to call upon the Judge of the Zillah Court to report, whether there was really no miscellaneous sitting about the time the petition was prepared; and in case no sitting had been held, to report from what date to what date it had been omitted. After this investigation should be completed, the Provincial Court was directed to pass whatever order might appear proper with regard to the admission or rejection of the appeal.

1819.

SHEIKH MOZUFFER BUKSH (Pauper), Appellant,

versus

May 12th.

THE COLLECTOR OF TIRHOOT, Respondent.

A public sale of the lands of the security of a farmer of an *abkaree mehal*, set aside by the Sudder Dewanny Adawlut on proof that the farmer was unable to perform his engagements, by not having had possession of the *mehal*, and means of enforcing the payment of the *abkaree* tax from the vendors of *lauree*.

THIS action was instituted *in forma pauperis* in the Provincial Court of Patna, on the 2nd of September 1813, by the appellant, against Government and others, to set aside the sale and recover possession of mouza Sheikdee, mouza Hetumpoor, and one half of mouza Bishenpoor, villages paying to Government an annual revenue of 699 rupees, 15 anas, 9 pie, and of mouza Kazee Chuk, &c. *mudud mash* villages yielding an annual produce of 700 rupees. The suit was laid at 7,064 rupees, 15 anas.

The substance of the plaint was as follows :

On the settlement of the *Abkaree mehals* of zillah Tirhoot by Mr. Fergusson the Collector, in A. D. 1811, Meer Sujaoodeen took a farm of the *mehals* of pergunnas Hajeepoor Sureysa, Milkee, Bullea, &c. for the year 1218, F. S., in the name of his nephew, Meer Moohummud Buksh. Nineteen *pottahs* were granted by the Collector, at various rates, the aggregate amount of the daily tax being 29 rupees, 12 anas, and the plaintiff became security for the regular payment of the tax. The tax is levied in the following manner: the farmer receives a *pottah* from the Collector, in virtue of which he grants *pottahs* to the *Pausees*, or persons who prepare and sell the *toddy* in the villages: these persons pay him a certain daily sum, which enables him to fulfil his engagements with Government. When the *gomashas* of the farmer went into the *mofussil* to levy the tax, the *Pausees* resisted, and refused to take *pottahs* from them. On a representation of the case to the Collector, he applied to the Magistrate for an order to the Police *Daroghas* to assist the farmer: The Magistrate considered the *pottahs* granted by the Collector illegal, as being contrary to the regulations, and issued orders to the *Daroghas* to take from the *Pausees* such *pottahs* as they might have received from the farmer, and to send them in to the Court. On this order the *Daroghas* took *mochulkas* from the *Pausees* not to take *pottahs* from the farmer. The farmer then resigned his *pottahs* into the hands of the *Tehsildar* of the *Abkaree mehal*, who sent them to the Collector. A second application having been made to the Magistrate, he declared that he had no intention of annulling the settlement, and that the Police *Daroghas* had mistaken his orders; he therefore, on the 19th of April 1811, prohibited the *Daroghas* from interfering. From the difficulties which had been thrown in his way during eight months of his lease, and the lapse of the *toddy* season, the farmer was unable to pay the tax; and Mr. Parry, the then Collector, issued *dustuks* to enforce payment of the arrears, amounting to 7,140 rupees, and on failure advertized the estates of the plaintiff, his security, for sale. The farmer applied both to the Collector and Magistrate for redress; and no attention being paid to his remonstrances, he appealed to the Provincial Court; but before any orders were received, the Collector had sold the estates of the plaintiff by public auction, mouza Kazee Chuk, &c. The *mudud mash* villages were purchased by Sheo Buksh Sahai. Of the *mal-*

goozaree villages, Sheikdee and Hetumpoor were purchased by Sheo Buksh Sahai, Ram Tuwukul Tewari, and Bhan Bhagtee, and the half of mouza Bishenpoor by Sewuk Rai. The plaintiff pleaded that the farmer never had possession, and the power of collecting the tax in the *mehals* in question, and that it was therefore unjust to hold him responsible for the arrears which had accrued; that Mr. Fergusson, the former Collector, evidently considered the *pottahs* annulled by the resignation thereof by the farmer, or else he would have proceeded to levy the arrears due at the end of each month, as directed by sections 14 and 15, regulation 6, 1800. He therefore instituted the present action for the purpose of setting aside the sale, and recovering possession of the villages from the auction purchasers.

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lector of
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The Collector of Tirhoot defended the suit on the part of Government. He stated that the farmer had fallen in balance to the amount of 7,140 rupees, and that he and the plaintiff, as his security, were called upon to pay this sum, and on their failing to do so the estate of the latter was sold: that the sale was perfectly regular: that the plaintiff should have deposited the arrears demanded from him, previous to the sale; and in the event of his having any objections to urge against the legality of the demand he should have stated them to the Collector, who would have redressed any grievance he might have laboured under; but that it was too late now that the estate was actually sold in consequence of his refusal to pay the arrears. He further stated, that on the day on which the sale was to have taken place, Enayut Ali, a relation of the plaintiff, begged that the sale might be put off for one month, promising to pay the sum demanded within that time; that the period of one month was allowed; but on the next day fixed for the sale, Enayut Ali being called on to pay the sum, said that thieves had broken into his house and carried off the money he had laid by for that purpose; and proposed two persons as securities, who however refused to bind themselves to pay the amount; and the Collector considering his excuses evasive sold the estate by public auction to the other defendants.

Sheo Buksh Sahai stated that the landed property of the plaintiff having been put up for sale by public auction, he purchased the *mudud mash* villages of Kazee Chuk, &c. on his own account; and that he, in conjunction with Ram Tuwukul Tewari and Bhan Bhagtee, purchased the *malgoozaree* villages of Sheikdee and Hetumpoor, and had been put in possession thereof by an *umul dustuk* issued by the Collector, and that since the sale, Ram Tuwukul Tewari had sold to him the share he had purchased, so that he had now possession of two-thirds of the *malgoozaree* villages. The other auction purchasers failed to appear to defend the suit.

The plaintiff filed several *roobukarees* of the Collector and Acting Magistrate of the district, in order to prove that the Collector had considered the settlement entered into by the farmer of the *abkaree mehals* in question annulled. The Collector filed, among other documents, several *kubooleuts* executed by Moohumud Buksh, the farmer of the said *mehals*, dated 1st Magh 1218, F. S., and the security bond executed by the plaintiff.

The Senior Judge of the Provincial Court considered the sale

1819. — of the plaintiff's lands for the arrears of the tax due from Moohummud Buksh to be correct, and liable to no objection. He observed, that although the first order of the Zillah Magistrate had thrown some obstacles in the way of the farmer, they had speedily been removed by his subsequent order; and that as his alleged resignation of his *pottahs* had not been accepted by the Collector, (who had no authority to accept the resignation, until the arrears due under the *pottahs* were liquidated), he was liable to be called upon to pay the full amount: that it did not appear that the farmer, or the plaintiff, had made any application to the Collector, to release them from their engagements subsequently to the 1st of April 1811, or that they had made any objections to the demand, or any exertions to stop the sale, although it had been postponed from the 3d of February to the 3d of March 1812, on the application of Enayut Ali. He was of opinion, that as the farmer had not sued the Collector, he had virtually acknowledged the legality of the demand for arrears, and that the plaintiff was not entitled to sue the Government on the plea of the illegality of the demand. He therefore dismissed the suit, leaving the plaintiff the option of instituting a suit against Moohummud Buksh for the recovery of the sum, in satisfaction of which his lands had been sold. The usual order in cases of pauper suitors was passed with regard to costs.

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lector of
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The plaintiff appealed from this decision to the Court of Sudder Dewanny Adawlut. With regard to the observations of the Senior Judge of the Provincial Court, that he was not entitled to sue Government, because Moohummud Buksh had not instituted a suit to dispute the legality of the demand for arrears, he observed that Moohummud Buksh had not been injured by the act of the Collector, and that he having been reduced to poverty by the sale of his estates, had a right to sue to recover them, as he considered himself unjustly deprived of them. He pleaded that the demand was in itself unjust, inasmuch as the farmer had never been able to realize any part of the tax from the manufacturers and vendors of the *toddy*, first from the obstacles thrown in his way by the *Pausees* themselves, and the orders of the Magistrate, and subsequently, by the resignation of his *pottahs* into the hands of the Collector, which had never been returned; it being expressly prohibited by regulation 6, 1800, to levy any duties from vendors of *toddy* without a *pottah* from the Collector. With regard to his apparent neglect in omitting to stop the sale, he stated that he knew nothing of the threatened sale of his estate, till it was concluded, as he had resided at Benares ever since he first entered into the security bond, and that he was at a loss to conceive the motives of Enayut Ali, in exerting himself in the manner he was stated to have done, unauthorized as he was by him, unless it were from the malicious intent of depriving him of the plea of ignorance, without any real intention of saving his estates; to account for which surmise he stated that they were not on friendly terms.

The Collector did not think it necessary to urge any other pleas, than those brought forward before the Provincial Court. The auction purchasers did not appear before the Court to defend the appeal.

The Court (present J. Fendall and S. T. Goad) on consideration of the circumstances of the case, did not consider the sale of the appellant's estates correct. They observed, that it did not appear that the *pottahs* resigned by the farmer had ever been restored to him, and that it was evident that the gentleman who held the office of Collector during the year 1218, F. S., for which time the *pottahs* would have been in force, considered the farmer exonerated from the conditions thereof; for had he conceived the *pottahs* to be still in force, he would, at the expiration of each month, have called upon the farmer and his security to pay up the arrears due for that period, as directed by section 14, regulation 6, 1800, and on failure of payment would have proceeded to enforce it in the mode laid down in section 15 of that regulation. No such measures appearing to have been adopted, the Court did not consider the succeeding Collector authorized in selling the estate of the security, without having called upon him to pay the arrears, and hearing his objection to the demand. They therefore passed a final decree in favour of the appellant, reversing the decision of the Provincial Court, and annulling the sale. The Collector was directed to put the appellant in possession of the estates, and to pay to him the mesne profits thereof for the period during which he was dispossessed, and to repay to the auction purchasers the amount paid by them, with interest at the rate of 12 per cent per annum, on their accounting for, and paying the amount of the mesne profits received by them during the period they had possession of the estates. The costs of suit in both Courts were made payable by Government.

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MUSSUMMAUT DOOLEH DIBIA and MUSSUMMAUT
SREE MUTTEE DIBIA, Appellants,

versus

RAJA OODWUNT SING and RAJA JANKI RAM, Respondents.

1819.

June 29th.

THIS suit was instituted on the 11th of January 1811, in the City Court of Moorshedabad, by Raj Chunder Rai and Ramoojee Dibia, zemindars of Chuckla Sheik Alleepoor, against Raja Buhader Sing, zemindar of pergunna Gowas, &c. in order to prove their right to receive the fees paid by the *Muhajons* and *Beoparees* for the use of certain *golahs*, and to recover from the defendant certain sums unjustly levied by him on this account.

A claim by
the appel-
lants to the
privilege of
levying
duties on
golahs
erected by
Beoparees
on the
lands of a
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son disal-
lowed.

The substance of the plaint was as follows :

The *golahs* of Bugwanpoor, called Bugwangola, have been long established on the banks of the river Puddan, but owing to the encroachments of the river, the shops are removed during the rains, and the *Beoparees* are in the habit of fastening their boats, and unlading their goods in the month of *Kartick* at any spot which may be most convenient for buying and selling, and pay to the proprietor of the *golahs* a certain sum as a fee. The plaintiffs

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and Raja
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stated the right of receiving this fee as inherent in the zemindaree of Chukla Sheik Alleepoor, and was purchased by them at public auction, with the said Chukla, and that they are entitled to receive the fee: that if the *Beoparees* erect their *golahs* on the lands of any other proprietor, they, the plaintiffs, are entitled to the fee on paying to the proprietor of the land the rent of the ground on which the *golahs* are erected at the pergunna rate; in proof of which custom, they pleaded that the *Beoparees* having established a cotton mart in the year 1211, B. S., within the boundaries of the village of Rukunpoor, which belonged to Turruf Bullia Shampoore in the zemindaree of Clunder Narain: Ram Rutti Chowdry, the *Dur Iyaradar* of the Turruf aforesaid, would not receive the rent from them at the accustomed rate, but sued them for dispossessing him of the land. The City Judge gave a decree in favour of the *Dur Iyaradar*, but the Provincial Court, on appeal, reversed the City Judge's decision, and passed an order to this effect: "As the *golahs* of Bugwanpoor had been purchased by the plaintiffs at public auction, they are entitled to receive the duties from the *Beoparees*, wherever they may fix their *golahs*, the proprietor of the land being merely entitled to receive from the said purchasers the rents of the ground on which the *golahs* are erected." In the year 1216, B. S., the *Beoparees* of Bugwanpoor established their *golahs* in the villages of Baleegoona, and Kureegoona: Baleegoona is situated in Jhyshpoor, a *Khareja mehal* of the plaintiffs zemindaree, of which an 8 ana share belongs to the plaintiff, 4 anas to Kunjunjee, and 4 anas to Syud Bukaoollao Kureegoona. is in the zemindaree of the defendant, who has taken the profits of the *golahs* established in both villages, and collected, through his servant, since the year 1216, B. S., the sum of 2,146 rupees, 12 anas, 8 gundas from the *Beoparees* of Baleegoona, and 298 rupees, 4 anas and 12 gundas from the *Beoparees* of Kureegoona, in all 2,445 rupees. The plaintiffs pleaded the custom aforesaid in their favour, and after deducting from the sum received by the defendant, the sum of 45 rupees, as the rent of about 50 beegas of land in Kureegoona, to which he was entitled as zemindar, sued him to recover the sum of 2,400 rupees, the sum unjustly received by him, and to obtain an injunction from the Court forbidding him to interfere with the plaintiffs in their just rights. The suit was laid at the annual produce of the *golah*, 200 rupees, and the sum claimed by the plaintiffs in all 2,000 rupees.

Raja Buhadur Sing demised subsequently to the institution of the suit, and Raja Hunoomunt Sing, Raja Oodwunt Sing and Raja Janki Ram, his sons, defended the suit. They stated that the plaintiffs had possession of the *golahs* of Bugwanpoor, and that they had not interfered with them, but denied their right to the privilege of levying duties from the *Beoparees* establishing *golahs* in the lands of other zemindars, all such exclusive privileges having been put a stop to by the abolition of the sayer duties. They stated that before the purchase of Chukla Sheik Alleepoor by the plaintiffs, the duties levied at Bugwangola were abolished, with the exception of *jumma chundeena* of 400 rupees on the said *golahs*, which remained, and that an abatement of 2,500 rupees was allowed in the *jumma* of the zemindaree to which it had

formerly been attached, and that the decision of the Provincial Court in the case of Rukunpoor, quoted by the plaintiffs, did not avail, inasmuch as the suit was not with the zemindar. They stated that the *golahs* which the plaintiffs stated to be in Baleegoona were in fact in Nushiteepoor and Shukurpoor, villages in their zemindaree, and that the plaintiff had no right or title to interfere with them; that the *Beoparees* who established *golahs* on their lands paid them for the use of the lands.

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Raja Ood-
wunt Sing
and Raja
Janki Ram.

The Acting Assistant Judge of the City Court of Moorshedabad was of opinion, that the plaintiffs had no right to the privilege claimed by them of levying a duty on the *golahs* established in Kureegoona, which was situated in the zemindaree of the defendants. With regard to Baleegoona, he observed, that one half thereof only belonged to the plaintiff, the other half being the property of Kunjunmunee and Syud Bukaoolla, and that they (the plaintiffs), had no right to sue alone. He did not consider the decision of the Provincial Court quoted by the plaintiffs of any avail. He therefore, under all the circumstances of the case, considered the claim unwarranted, and dismissed the suit with costs, leaving them the option of suing in conjunction with Kunjunmunee and Syud Bukaoolla for the produce of the *golahs* erected in Baleegoona.

The plaintiffs being dissatisfied with this decision appealed to the Provincial Court, stating their claim as before, and adding that Kunjunmunee and Syud Bukaoolla did not claim to participate in this privilege, and that they had granted them *rights* for the ground on which the *golahs* were erected. The same pleas were urged by the respondents in the Provincial Court, as they had brought forward in the City Court. The Court, however, saw no reason to alter the decision of the City Court, and dismissed the appeal with costs.

A further appeal was admitted by the Court of Sudder Dewanny Adawlut for the purpose of considering the apparent contradiction between the decisions of the City Court and the former decree of the Provincial Court. At this stage of the proceeding both the appellants demising, the appeal was carried on by Mussummaut Dooleh Dibia and Mussummaut Sree Muttee Dibia, their heirs, and Raja Hunoomunt Sing dying, his brothers defended the appeal.

The Court (present W. Leycester) on due consideration of the case, considered the decisions of the City and Provincial Courts perfectly correct, and therefore confirmed them and dismissed the appeal, leaving to the appellants the same option as was intimated to them in the decree of the City Court.

1819.

AJEET SING and others, Appellants,

versus

July 16th.

HURLAL SING and others, Respondents.

The Provincial Court dismissed on default an appeal, because the appellants neglected to file a reply to the respondent's answer. The Sudder Dewanny Adawlut considering the reply unnecessary under the spirit of section 9, regulation 26, 1814, although the appeal was admitted before the date fixed for the operation of that section, ordered the Provincial Court to readmit the appeal and try it on its merits.

THIS was a summary appeal admitted under the second clause of section 3, regulation 26, 1814, against an order of the Provincial Court of Patna, dismissing an appeal on default.

It was stated in the petition of appeal presented to the Court of Sudder Dewanny Adawlut, that the respondents had obtained a decree against the appellants in the Civil Court of Zillah Tehoot, awarding to them possession of a 13 ana, 6 gunda, 2½ cowry share of mouza Akberpoor, a *Nizamut mehal* of pergunna Moolkee: that the appellants being dissatisfied with this decision, an appeal was admitted by the Provincial Court of Patna: that the respondents filed their answer to the petition of appeal on the 7th of March 1817; that the appellants not having filed a reply thereto on the 8th of December 1817, were ordered to file it in a week, and on their failing to do so by the 29th of December, the Second Judge dismissed the appeal. The appellant therefore preferred an appeal to the Court of Sudder Dewanny Adawlut on the following pleas: That under the provisions of section 9, regulation 26, 1814, it was unnecessary to file a reply to the respondents answer: that as the number of cases on the file of the Provincial Court before the case in question did not warrant a conclusion that it would come on so soon, and as their dwelling was distant from the Court seven days journey, they were not present at the time, nor aware of the order contained in the proceedings of the 8th of December 1818, and could therefore not be considered to be guilty of disobedience thereto; and that if their *vakeels* had been negligent, justice required that the punishment of their neglect should fall on them and not on their clients.

The respondents pleaded that the section quoted by the appellants provided, that in all appeals admitted subsequently to the 1st of February 1815, no further pleadings beyond the answer of the respondent should be admitted; that the appeal in the present case having been admitted on the 3d of October 1814, the Judge, in dismissing the appeal, was guided by the regulations in force, by which the reply was required to be filed.

The Court (present W. E. Rees and S. T. Goad) after considering the import of section 9, regulation 26, 1814, were of opinion, that although the appeal had been admitted previously to the date on which the operation thereof was to commence, yet as the section in question was in force at the time the appeal was dismissed, and as no injury could be sustained by the respondents from the decision of the suit without the reply of the appellants having been filed, it was but just, and consonant to the spirit of the section in question to have tried the appeal, although no reply was filed. They therefore reversed the order of the Provincial Court dismissing the appeal, and directed the Court to readmit the suit on their file and to try and decide it on its merits.

BHOLA NATH DOSS, Appellant,

1819.

versus

MUSSUMMAUT SABITREEA, Respondent.

July 16th

THIS was a summary appeal from a summary order passed by the Provincial Court of Dacca in the case of a contested succession to the estate of a deceased proprietor.

The Civil Courts are restricted by regulation 5, 1799, from interfering with the succession to the estate of a person deceased, without the institution of a regular civil suit, except in the special cases provided for.

The Appellant stated that Ram Surrin Rai, the proprietor of one-third of a three ana six gunda share of pergunna Humnabad, in the district of Tippera, having no son by his first wife, adopted him (the appellant) in the year 1194, B. S., when he was two years and a half old, after performing all the ceremonies of adoption, took him into his house, and on the occasion of his going on a pilgrimage, acknowledged him as his adopted son in petitions presented to the Judge and Collector of the district: that on the death of his first wife, he married Mussumaut Sabitreea the respondent, by whom he had a son Esan Chund: that he died on the 19th of *Bysakh* 1223, B. S., leaving the appellant, his adopted son, his said wife, and his son Esan Chund a minor: that he (appellant) and Esan Chund were entitled to share equally in the estate of Ram Surrin Rai, and that he had possession of his share: that the Collector having applied to the Judge to appoint a guardian to the minor, Mussumaut Sabitreea recommended persons to whom he objected: that she in revenge, presented a petition to the Judge, denying the adoption of the appellant, and claiming the whole estate for her minor son. The Judge after a summary investigation, rejected her petition on the 18th of August 1818, and she appealed from this order to the Provincial Court at Dacca. That Court, being of opinion that the right of the parties could not be recorded by a summary enquiry, passed an order on the 26th of December 1818, directing the Judge of the Zillah Court to appoint a manager to take charge of the estate, and to refer the appellant to a regular suit for the adjustment of his claim. He appealed from this order to the Court of Sudder Dewanny Adawlut. He pleaded, that as he had possession of the share which he claimed he could not be dispossessed by a summary order, and prayed that the order of the Provincial Court might be reversed, as being contrary to the provisions of regulation 5, 1799, and that the respondent might be referred to a regular suit for the adjustment of her claims.

The respondent denied the adoption of the appellant, and his right to any share in the property left by her deceased husband. The Court of Sudder Dewanny Adawlut (present W. E. Rees and S. T. Goad) did not think it necessary to go into the merits of the case. They observed that the Civil Courts are restricted by regulation 5, 1799, from interfering with the succession to the estate of a person deceased, without the institution of a regular civil suit, except in the cases therein specially provided for, and that the proceedings held in this case by the Zillah and Provincial Courts, from first to last, were irregular and contrary to the regulation above quoted. They therefore passed an order on the 16th of July 1819, directing the Zillah and Provincial Courts to consider

1819. the summary orders passed by them annulled; and the whole of the proceedings cancelled, and not to be made use of in any suit which might subsequently be instituted. The Zillah Judge was ordered to restore possession of the estate to the person who had possession before the interference of the Courts; leaving the party out of possession to institute a regular suit for the adjustment of his claim, and not to interfere in any way until such regular suit should be instituted; when he would follow the rules laid down for his guidance in regulation 5,1799.
- Bhola Nath
Doss, v.
Mussum-
maut Sabi-
treea.

1819. GOVIND CHUND (for himself and his Brother, a Minor),
Appellant,
Aug. 20th. *versus*
NUNDANUND SING, (son of RAJA DOOLAR SING, deceased),
Respondent.

Four years after the date of a decree for money the decree holder sued out execution against the grandson of the person against whom the decree was given: as the case involved a point of Hindoo law, which could not be properly determined on a summary suit, the decree holder was referred to a regular suit, to prove the liability of the person from whom he claimed the amount adjudged.

RAJA Doolar Sing, the father of the respondent, having sued Ruttun Chund and Manick Chund in the Zillah Court of Purnea, obtained a decree against them for the sum of 18,842 rupees, on the 6th of August 1806. After the death of these persons, and four years after the date of the said decree, the Raja being unable to point out any property belonging to the said defendants, presented a petition to the Zillah Judge, stating that Ameen Chund, the son of Manick Chund and father of the appellant, had always lived in family partnership with Manick Chund, his father, and prayed that the amount due to him by Manick Chund, under the decree obtained against him, might be paid by the appellant, out of the sum of 16,000 rupees, the property of Ameen Chund which he had in his hands. The appellant declared that the money in question had been acquired by the unaided exertions of his father, Ameen Chund, and consequently was not liable to the debts of Manick Chund. The Judge, in the first instance, attached the sum of money in question, examined witnesses and consulted the pundits of his own Court and of the Provincial Court of Moorsshedabad, with regard to the Hindoo law as applicable to the case. After completing the investigation, he considered it to be proved that the money had been acquired by Ameen Chund the father of the appellant, and therefore rejected the petition of the Raja. He, being dissatisfied with this order, appealed to the Provincial Court of Moorsshedabad. That Court, after considering the proceedings held by the Zillah Judge, were of opinion that as Ameen Chund lived in family partnership with his father Manick Chund, the property in question was liable to the payment of the debt due to the Raja by the latter, and therefore ordered that the amount due to the Raja under the decree of the Zillah Court should be paid from the money in the hands of the appellant.

The appellant appealed from this order to the Sudder Dewanny Adawlut, on the same pleas as he urged against the Raja's claim

in the Zillah Court. The Raja declared that the father of the appellant always ate and lived with Manick Chund, and that they continued in family partnership till the death of the latter, when Ameen Chund took possession of the property left by him to a large amount, and that the property held by Ameen Chund was consequently liable to the debts of his father. After filing his answer he died, and was succeeded by the present respondent, his son.

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Nundanund
Sing.

The Court (present W. E. Rees and S. T. Goad) having admitted an appeal, and considered the whole of the proceedings filed, did not think the Provincial Court were correct in passing such an order, merely on a summary enquiry. They observed, that it was not clearly proved, whether the property in question was part of the property left by Manick Chund, or whether it had been acquired by the unaided exertions of Ameen Chund, and that this point and the question of the liability of the property, if it should be proved to have been acquired by Ameen Chund, to the debt of Manick Chund, could not be properly decided, unless by the institution of a regular suit by the respondent, as heir of Raja Doolar Sing against the heirs of Manick Chund. For these reasons, therefore, the Court passed an order on the 20th of August 1819, reversing the order of the Zillah Judge for the sequestration of the sum of money in question, and that of the Provincial Court, in which they ordered that the sum due under the decree should be paid therefrom. The Zillah Judge was directed to remove the attachment of the property and the respondent informed, that if he considered the property of Ameen Chund liable under the Hindoo law to the debts of Manick Chund he was at liberty to institute a regular suit against the appellant to obtain payment of the sum due to him under the decree against Manick Chund.

KISHEN GOVIND, Appellant,

1819.

versus

LADLEE MOHUN THAKOOR, Respondent.

Aug. 30th.

THIS suit was instituted in the Provincial Court of Calcutta by the appellant, who sued Mussumaut Oojulmune, the elder widow of his deceased brother, Kishen Kaunt Sein and Gopee Mohun Thakoor and Ladlee Mohun Thakoor, in order to set aside the sale, and to obtain possession of Turuf Russoolpoor, a *malgoozaree mehal*, situate in Zillah Jessore, the annual produce of which is 39,000 rupees, which he stated had been illegally sold by the former to the two latter defendants.

A Hindoo
having no
son exe-
cutes a
deed,
whereby
he grants
to his
senior
widow the
whole of
his acquired
property, in
the event
of no son

It was stated in the plaint, that the plaintiff and his brother Kishen Kaunt Sein, as members of a joint Hindoo family, had, by their united exertions acquired property to a large amount, consisting of landed estates in the districts of Jessore, Nuddeah

1919. and Midnapore, houses in Calcutta and Berhampore, and cash and jewels: that Kishen Kaunt Sein had two wives, Oojulmune being born, and Taramunee, who each produced a son, which sons died shortly after their birth: that on his becoming deranged, a commission of lunacy was issued from the Supreme Court, and the Master was directed to take charge of his property: that on the joint application of his two wives, his property was made over to the custody of Oojulmune, on her giving security that the said property should be forthcoming if claimed by other heirs; and Biccakur Rai was appointed by the Court of Wards, *Sirberakar*, or manager of the landed estates: that Kishen Kaunt Sein died in 1206, B. S. (A. D. 1799, 1800) and the widows disagreeing in the year 1209, B. S., (A. D. 1802-3), the junior widow, Taramunee, sued Oojulmune, the senior widow, in the Supreme Court for half the said property; but afterwards compromised the suit, and receiving from Oojulmune the sum of 52,500 rupees, executed a deed of general release, and relinquished the rest of the property to her: that in the year 1211, B. S., (A. D. 1804-5), Oojulmune sold to Gopee Mohun Thakoor and Ladlee Mohun Thakoor the Turuf Russoolpoor, and in the year 1215, B. S., (A. D. 1808-9) the rest of the landed estates, to other persons: that at the time she sold the Turuf Russoolpoor, she had moveable property left by her husband to the value of ten lakhs of rupees, and that she, being a childless widow, had no right to alienate her husband's immoveable property to a stranger without the consent of the heirs of her husband. He, therefore, being the nearest heir to his deceased brother, instituted the present action in order to set aside the sale, and to obtain possession of the turuf in question, laying his action at the annual produce thereof. Oojulmune, though duly summoned, did not appear to defend the suit. The claim of the plaintiff was resisted by Gopee Mohun Thakoor and Ladlee Mohun Thakoor on the following pleas: Kishen Kaunt Sein while in his sound senses, previous to his becoming insane, made over the whole of his property to Oojulmune, his elder wife, by a deed of gift, and she had possession thereof during his life. As he was in debt when he died, his widow sold the turuf in question to them, in order to raise money to pay off the said debts as well as other debts incurred at his *shradh*, or funeral obsequies. They pleaded that as she did not sell the whole of the property left by her husband, the sale was perfectly legal. They also pleaded that the plaintiff had no right to institute this suit, as the two widows of his brother were still alive.

After the pleadings had been filed, information having been received of the death of Oojulmune subsequently to the institution of this suit, it became necessary to decide whether Taramunee, or the plaintiff and his sons were legal heirs to the property left by her. After consulting their Hindoo law officer, the Provincial Court determined that Taramunee should be permitted to defend the suit on behalf of Oojulmune, leaving the plaintiff the option of instituting a regular suit against her to prove his right to succeed to the property. In pursuance of this permission, the plaintiff instituted a separate suit against Taramunee to prove his right to the property of Oojulmune, but the suit was compromised by the

parties, Taramunee relinquishing to the plaintiff her claim to turuf Russoolpoor. 1819.

It should be premised, that the plaintiff had instituted actions against Oojulmunee and Kishen Chand Pal Chowdry, the purchaser of mouza Malee Gaon, situate in Zillah Midnapore, and against Oojulmunee and Kishen Chand Singh, the purchaser of the talook of Basdeopoor, to set aside the sales of those mehals, and obtained decrees in both suits. He filed in this case the copy of the decree in the case of mouza Malee Gaon. From this decree it appeared that Oojulmunee defended that suit, and claimed the whole property, real and personal, of her deceased husband, under a deed of gift (*danputra*). In order therefore to ascertain the right of Oojulmunee to alienate the said property under the *danputra*, the pundit of the Provincial Court was consulted: his *vyavastha* was not considered satisfactory by the Court, who quoted a passage from the Digest of Hindoo Law, translated by Mr. Colebrooke, (sections 476 and 477, page 277, volume 4,) whence it appears, that a wife is entitled to succeed to the real and personal property of her husband, but cannot alienate it like *stridhun* (property, real and personal, which a woman receives at her marriage from any other than her husband). The Court overruled the plea of Oojulmunee, that she had sold the property in question (the Malee Gaon estate) in order to defray the expences incurred for the funeral obsequies of her deceased husband, as it was proved that she had at the time in her hands a large sum of money left by her husband. The Court therefore annulled the sale, but declared that the plaintiff had no right to the estate during the lifetime of the widows of his brother. It was therefore ordered, that the estate should be restored to Oojulmunee, on her repaying the purchase money, and in default of payment, that it should remain in the hands of the purchaser, till the full amount of the purchase money should be liquidated from the proceeds thereof, on his giving security not to allow the *malgoozaree mehals* to fall in arrears. The plaintiff also filed papers to prove that Oojulmunee had not been compelled by poverty to sell the turuf in question.

The defendants, Gopee Mohun Thakoor and Ladlee Mohun Thakoor, filed several papers of accounts attested by the signature of the Master in Equity in the matter of the estate of Kishen Kaunt Sein, a lunatic, and the deed of sale executed by Oojulmunee in their favour, under the fictitious name of Ram Mohun Mookerjee, wherein she stated that her husband had purchased turuf Russoolpoor, situate in pergunna Eusatpoor, zillah Jessore, containing 56 mouzas, at a sheriff's sale, and that after his death, it had been registered in her name in the Collector's office at an annual *jumma* of 27,649 rupees. 3 anas, and 14 gundas, and that being unable to pay the government revenue, she had sold it to them for the sum of 44,001 rupees. This deed was dated 20th of December, A. D. 1804, corresponding with 7th Pous 1211, B. S., and had been duly registered in the Zillah Court of Jessore.

The plaintiff called no witnesses. After the witnesses of the defendants had been examined, and the whole of the pleadings and documents had been read and maturely considered, the Court observed; 1st, that the plaintiff had no right, in the first instance,

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1819. to institute this suit during the lifetime of Oojulmune, who had been declared by the decree in the Malee Gaon case filed by the plaintiff, to be the person entitled to the property during her lifetime, and that after her death, Taramune was entitled to the property: 2nd, that under the *danputra* executed by Kishen Kaunt Sein, in favour of Oojulmune, she became sole proprietor of his estates, and that the plea of the relinquishment of Taramune in favour of the plaintiff, was barred by her former relinquishment of the property, under the deed of general release executed by her, and filed in the Supreme Court: 3d, that section 6, regulation 11, 1793, which authorizes landed proprietors to give away their property either to one or more of their heirs, or to a stranger, had apparently been overlooked in the former decisions; and lastly, that it was clearly proved by the deposition of the witnesses that Oojulmune had incurred heavy debts in performing the funeral obsequies of her husband, and that as she had not wherewithal to discharge these debts, she had sold the turuf in question for that purpose. For these reasons the Court considered the plaintiff's claim untenable, and accordingly dismissed the suit with costs.

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The plaintiff appealed from this decision to the Court of Sudder Dewanny Adawlut. He pleaded that, by the death of Oojulmune, and the deed of general release executed by Taramune in favour of Oojulmune, and the deed of relinquishment executed by her in his favour, he was now the only lawful claimant of the property of his deceased brother. He denied that his brother had ever executed a deed of gift in favour of Oojulmune, and stated, that it appeared from a document said to be a copy of the deed said to have been executed by him (the original of which was not forthcoming,) that the condition on which Oojulmune was to have taken the property, was that no son should be born to her, and that as she had given birth to a son, which survived a short time, her claim under that deed was untenable. He denied the relevancy of section 6, regulation 9, 1793, to this case, and still insisted on the illegality of the sale, as Oojulmune had sufficient funds to defray the expences incurred at her husband's funeral obsequies, without selling the turuf in question, which plea, he observed, was contrary to the terms of the deed of sale, which expressly stated the cause of the sale to be the inability of Oojulmune to manage the turuf in question.

The appeal was defended by Ladlee Mohun Thakoor, to whose share, on a partition of the joint property of the family, the turuf in question had fallen. He insisted on the former pleas urged in the Provincial Court, in support of his claim to the turuf in question, and urged a new plea, viz. that Oojulmune had purchased the turuf in question at a Sheriff's sale for 20,000 rupees, and that if it should be urged that she had purchased it with money taken from the estate of her husband, his (the husband's) heirs could only claim the money taken from the estate, and not the property purchased therewith. He wished to file documents to prove this plea, but as he had not urged it at any former stage of the proceedings, the Court refused to receive his proofs, and proceeded to try the case on the pleas urged in the Provincial Court. The circumstances of this case being perfectly similar to the Malee Gaon case, which

had come before the Court in appeal, the Court perused the opinions delivered by their Hindoo law officers in that case. It appeared that the following questions were put to them. Kishen Kaunt Sein had two wives, the elder named Oojulmune, and the younger Taramune. He executed a deed of gift in the year 1201, B. S., having at the time no children, whereby he gave the whole of his property to his elder widow, in case she should not have a son. After the execution of this deed Taramune was delivered of a son, and Oojulmune, in a short time after, also produced a son, but both the children died during the life of their father. After his death Oojulmune took possession, as being senior widow, and under the deed of gift, of the whole property, real and personal, mentioned in the said deed. Taramune the younger widow sued Oojulmune in the Supreme Court, but before the suit came to a hearing, she received from Oojulmune a sum of money, and executed a deed of general release, thereby relinquishing her claim to the property in question. Under these circumstances: 1st, is the deed of gift correct, or not? 2nd, Does the birth of sons, who died during the lifetime of Kishen Kaunt Sein, invalidate the deed or not? 3d, If the deed of gift is valid, is Oojulmune authorized, under the *Shaster*, to alienate the property, or not? 4th, If the deed of gift be considered invalid, does the deed of general release, executed by Taramune, and filed in the Supreme Court, bar the claim of Taramune to the property left by her husband?

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Reply to question 1st; If the deed of gift, in respect of self-acquired property (not ancestrel) be voluntarily executed in the native language by Kishen Kaunt Sein in favour of his senior wife Oojulmune, to this effect, "you are my elder wife, if a son shall be born to you, all my property shall become his; if you shall not be delivered of a son, then I give my property to you;" such deed would have been valid, according to the conditions therein contained, if no son had been born to Oojulmune; and agreeably thereto, Kishen Kaunt Sein being the donor and Oojulmune the donee, the gift would be complete. In the disposal of self-acquisitions, the owner's will alone is requisite. This opinion is conformable to the *Dayabhaga*, *Dayatutwa* and other authorities current in Bengal.

Authorities: the text of *Vishnu* cited in the *Dayabhaga* and other works: "His will regulates the division of his own acquired wealth" The text of *Catyayana* laid down in the *Vyuvustharnuva*, *Vivadabhungarnuva*, and other authorities: "At his pleasure he may give what himself acquired." (a)

Reply to question 2nd: A son having been born to Taramune and another to Oojulmune, subsequently to the execution of the deed of gift, and both (the sons) having died during the lifetime of their father Kishen Kaunt Sein, yet the birth of the son by Oojulmune invalidates the deed of gift drawn in her (Oojulmune's) favour; because it is mentioned in that deed, that "if a son shall be born to you, all my property becomes his." Here the expression "if a son shall be born to you, all my property becomes his," being the donor's will; the son's property accrues over the wealth

(a) The passage here cited is not the text of *Catyayana*, but of *Vrihaspati*, (vide *Dig.* vol. 2, p. 246.)

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as far as the donor's will extends. Therefore by the father's will the birth of the son becomes the means of his acquiring property over the father's estate, in like manner as the ceremonies attendant on the birth of a male become necessary by authority of law (that is *Shruti* and *Smriti*); but there is no text enjoining the suspension of the son's right until the father's death. The will of the father making a partition during his lifetime induces the extinction of his property; in like manner his right thereto becomes extinct on his willing to make a donation of it. Had it been the intention of the father to create a right over the property for his son, after his death, his expressed will would be superfluous. By the authorities current in the province of Bengal, a son has no inherent right over the property during the life of his father; but by the mention in the deed of gift, "if you should not be delivered of a son, then I give my property to you," it is understood that the condition of the gift being the birth of a son, on the son's birth the gift becomes complete (in favour of the son). It is a general and established maxim laid down in all authorities, that in all compacts or agreements, involving a condition, the failure of the condition invalidates the compact. Hence a compact, in which it is conditioned that it shall depend on the fact of no son being born, becomes annulled by the birth of a son.

Authorities: "Whatever a father through natural affection gives to a son, or other persons, cannot be resumed." This is the comment of the text, "That things once delivered, as the price of goods sold, &c." cited in the *Vivadabhungarnuva*. "For the will of the giver is the cause of property." *Dayabhaga*. "The will of the donor is the cause of the right of the donee." This is the comment of *Sricrishna Terkalankara* and others. *Shoodhi tutwa*, *Vyavustharnuva* and other tracts: "A gift to which conditions are attached, becomes invalid by a failure of the conditions." "If the subject pay not the revenue, the grant, being conditional, is annulled by the breach of the condition." *Bhuvadeva Bachespati's* opinion cited in the *Vivadabhungarnuva*.

Reply to question 3d: Under the circumstances stated in the answer to the 2nd question, the condition (that is the birth of a son) of the gift made by Kishen Kaunt Sein in favour of his senior wife having been avoided, the property mentioned in the deed of gift should be declared to be vested in the son of Kishen Kaunt and Oojulmunee immediately on his birth. On his death leaving no issue and heir down to the daughter's son, it reverted by inheritance to his father, and on the death of the father it vested in the mother Oojulmunee. A female has only a life interest in the property which she obtains by succession, as she has no power to alienate it by gift or sale without the consent of her husband's family and heirs. Hence Oojulmunee had not that controul which she would have had under the deed of gift had it been valid.

Authorities: the texts of *Yajnyawalkya* and *Catyayana*, cited in the *Dayatutwa*, *Dayabhaga*, and other authorities: "The wife and the daughters, also both parents, brothers likewise, &c." "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death, after her let the heirs take it." "When

the husband is deceased, his kin are guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power. But if the husband's family be extinct, or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a *Sapinda*." *Vrihaspati* in the *Dayabhaga* and other tracts.

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Reply to question 4th: Although the deed of gift which had been executed by Kishen Kaunt Sein in favour of Oojulmune, his senior wife, according to law be invalid, yet the release under date the 14th of December 1803, which Taramune after suing Oojulmune in the Supreme Court, filed in that tribunal, according to which the cause was decided, bars her (Taramune's) claim to her husband's estate, as she voluntarily executed the deed of relinquishment.

Authorities: "Silent neglect (*oopaasha*) constitutes the forfeiture of property, the right to which however cannot be revived by the mere act of subsequent volition."

On consideration of the circumstances of the case, as elicited from the pleadings and documents filed, and the Hindoo law as applicable to the case, the Court did not consider the plea of the respondents, that turuf Russoolpoor was sold to defray the expences of the *shradh* of Kishen Kaunt Sein, and to pay his debts, to be at all established: that the contrary was proved by the evidence, and the terms of the deed of sale, which stated the cause of sale to be the inability of Oojulmune to pay the public revenue assessed thereon. They considered the appellant to be entitled to succeed to the property in right of inheritance from his brother, and therefore reversed the decree of the Provincial Court, and directed that he should be put in possession thereof. As, however, he had not interfered to prevent the sale, and had allowed his claim to be dormant for so many years, and as the purchase by Gopee Mohun Thakoor and the respondent did not appear to be fraudulent, mesne profits were not allowed. From the circumstances of the case, it appeared just to the Court to charge the costs of suit to the parties respectively, which was accordingly ordered.

Ladlee Mohun Thakoor preferred an appeal from this decision to the King in Council, but having neglected, for nearly four years, to take any steps towards prosecuting the appeal, the appeal was dismissed on the 21st of August 1823.

1819 JHYNTEE RAM MISSER, RAM BUKSH MISSER, SHEO-
 DEEN MISSER and KASHENATH MISSER, (Son of BUN-
 Nov. 8th. CHA RAM MISSER, Brothers of RUTTEE RAM, deceased),
 Appellants,
versus
 RAJA MHYPAL SING, and BABOO FUTTEH BUHADUR
 SING, Respondents.

A security bond executed by one member of a joint undivided Hindoo family held to be binding on the other members of the same family; the separation pleaded in bar to the claim not having been established and deemed to have been fraudulently alleged in order to evade payment of the debt.

A case of *arzamnee* or counter-security.

THIS action was instituted by the respondents in the Provincial Court of Benares, on the 1st of December 1813, to recover from the heirs of Ruttee Ram deceased, and from Ram Doss, the sum of 43,257 rupees, 12 anas, 3 pie.

The facts of the case as stated by the plaintiffs were as follow:

Raja Bikramajeet Sing having instituted a suit in the Zillah Court of Allahabad, on the 29th of August 1808, to recover possession of the talook of Dya, which he claimed as his hereditary estate, from Lal Isruj Sing; his claim was dismissed; he appealed to the Provincial Court of Benares, where a decree was passed in his favour, on execution of which he obtained possession of the talook. Lal Isruj Sing having demised, his son and heir, Lal Rooder Pertaub Sing, appealed to the Sudder Dewanny Adawlut; when the appeal having been admitted, Lal Dhowkul Sing, the son of Raja Bikramajeet Sing, who, as heir to his deceased father, had succeeded to the possession of the talook in question, was allowed by the Court to retain possession thereof pending the appeal, on his furnishing security to the amount of one year's produce. Raja Ram Gholam Sing, father of the plaintiffs, became security for him to the Court; and Ruttee Ram and Ram Doss entered into a bond engaging to indemnify him for any loss which he might eventually sustain, in case the decree of the Provincial Court should be reversed. The decree of the Provincial Court was reversed by the Sudder Dewanny Adawlut, and a decree was passed by that Court under which possession of the talook was restored to Lal Rooder Pertaub Sing; and the plaintiffs, who, on the death of their father, which had occurred in the interim, had become security for Lal Dhowkul Sing to the Court, were called on to pay the sum of 53,887 rupees, 4 anas, 3 pie, the mesne profits due from Lal Dhowkul Sing. They therefore instituted the present action to recover from Ram Doss and the heirs of Ruttee Ram, the amount due under the counter-security bond, as by the following statement:

Demanded from Raja Ram Gholam, under the orders of the Court.....	rs.	A.	P.
	53,887	4	3
Deduct paid to Raja Ram Gholam.....	8,000		
Paid to Baboo Futteh Buhadur Sing, after the death of Raja Ram Gholam.....	8,000		
	<hr/>	16,000	0 0
		37,887	4 3
Add costs of suit.....	5,370	8	0
Sum claimed from the defendants.....	43,257	12	3

Jhyntee Ram Misser, Ram Buksh Misser, and Sheodeen Misser, the brothers, and Kashinath Misser, son of Buncharam Misser, brother of Ruttee Ram, pleaded that they were not answerable for the debts of Ruttee Ram, they having long since divided the family property, and separated from him: in proof of which they stated that Ram Buksh Misser had become security to the Collector for the payment by Dhowkul Sing of the revenue due from the talook to Government; they also stated, that on the death of Raja Ram Gholam to whom Ruttee Ram and Ram Doss were security, Lal Rooder Pertaub Sing moved the Court of Sudder Dewanny Adawlut to demand fresh security from Lal Dhowkul Sing; and that the Court accordingly did call upon him to furnish fresh security; that Lal Dhowkul Sing requested Ram Buksh Misser, one of the defendants, to become security, and on his refusal, Baboo Futteh Buhadur Sing, with the knowledge and consent of his elder brother Raja Mhypal Sing executed the required bonds. They pleaded that Ruttee Ram and Ram Doss had become security merely to indemnify Raja Ram Gholam, that their liability under the bond executed by them ceased on the death of the said Raja, and that as they had not agreed to be security for the present plaintiffs, their heirs could not in justice be required to indemnify them. It was moreover alleged, that as the plaintiffs had not yet paid the amount demanded from them into Court, they could not claim it from the counter-securities, even were the demand admitted to be just.

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The sons of Ruttee Ram stated, that after the counter-security bond had been entered into, the management of the talook was made over to the counter-sureties: that Lal Dhowkul Sing having complained to Raja Ram Gholam of the hardship of allowing the talook to remain in the hands of strangers, he (Raja Ram Gholam) came to the head *Cutchery* of the talook, and agreed to release the counter-sureties from all responsibility under the bond executed by them, on their repaying the amount collected by them, and giving up possession of the talook; that they accordingly paid him the sum of 10,000 rupees, which they had collected, and gave up the estate to Lal Dhowkul Sing, and that Raja Ram Gholam, in the presence of some of the most respectable persons in the parguana, exonerated them from all responsibility, and promised to give up the security bond on his return to his home: that he immediately proceeded towards his home, but falling sick on the road, died a few days after reaching his house, and that the security bond was therefore not returned. They also pleaded, that as their father and Ram Doss had not agreed to be security to the plaintiffs, on the death of their father Raja Ram Gholam, when the security entered into by them had become void, their heirs were not liable to be called upon to indemnify the plaintiffs.

The plaintiffs denied, in their reply, that the family of the defendants was divided; they stated that Ruttee Ram being the elder brother, the bond was signed with his name, and that Jhyntee Ram Misser and Ram Buksh Misser, who were both present, concurred in his act; and that, after the execution of the bond, the brothers had joint possession of the talook, and collected the rents thereof; that the joint funds of the family were therefore

1819. liable to the payment of the debt. They denied that their father had, as stated by the sons of Ruttee Ram, exonerated him and Ram Doss from responsibility under the bond, and stated, that when, on the death of their father, fresh security was demanded from Lal Dhowkul Sing, Ruttee Ram and his brothers accompanied Lal Dhowkul Sing, and united with him in requesting them to become security to the Court, acknowledging at the same time the security entered into by them in favour of Raja Ram Gholam to be still binding: and that on this Baboo Futteh Buhadur Sing, with the consent of Raja Mhyal Sing, entered into the security required.

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The rejoinders of the defendants were in all respects similar to their answers. Ram Doss did not appear to defend the suit, either in person or by *vakeel*. The plaintiffs filed the security bond entered into by Ruttee Ram and Ram Doss, engaging to indemnify Raja Ram Gholam for any loss he might sustain by being security for Lal Dhowkul Sing. Each party filed a *muhzurnama*, or written requisition inviting all persons possessing any knowledge of the fact, to declare the joint or divided condition of the family of Ruttee Ram, and to attest that declaration by their signatures: each of these documents was signed by numerous witnesses in attestation of the opposite facts which they were brought to prove; and many, on both sides, who were examined, deposed in favour of the party who summoned them.

The Second Judge of the Provincial Court, before whom the case was tried, considered the defence to rest on the following pleas: 1st, that the counter-security entered into by Ruttee Ram and Ram Doss was merely to indemnify Raja Ram Gholam, and had therefore become void by his death: 2nd, that even if the bond should still be binding on Ruttee Ram, yet, as having been executed by him, at a time when the family was divided, it was not obligatory on the other members of the family. The Second Judge did not consider either of these pleas to have been established. It appeared in evidence, that when the bonds were entered into, Ruttee Ram and his four brothers, Jlyntee Ram, Ram Buksh, Sheodeen, and Buncha Ram were associated in family partnership, that Raja Ram Gholam satisfied himself of this fact, previously to becoming security for Lal Dhowkul Sing: and that the share of Ruttee Ram in the family property was not sufficient, if separated from the rest of that property, to have warranted a prudent man in accepting the guarantee of his single security for so large a sum. The *tusuraf zaminee* (or the security entered into by Raja Ram Gholam eventually to make good the sums collected by Lal Dhowkul Sing, if the decree of the Provincial Court in his favour should be reversed,) and the *arzaminee*, (or the counter-security entered into by Ruttee Ram and Ram Doss to indemnify the Raja from loss on account of his *tusuraf zaminee*,) were both executed on the same date; and it was in evidence, that after the execution of the counter-security, Ruttee Ram had no personal communication with Raja Ram Gholam or the plaintiffs; all transactions between the parties having been carried on by the brothers of Ruttee Ram, in reliance of whose assurance that they considered the counter-security bond to be still binding on them, the plaintiffs consented to be

security for Lal Dhowkul Sing. The cause of the separation of Ruttee Ram from his brothers was stated to be a quarrel which arose between them, and continued till his death : it was however proved by the evidence, and by the production of a copy of the security bond, that Ruttee Ram and Jhyntee Ram had entered into joint security for the costs of the appeal to the King in Council, preferred by Lal Dhowkul Sing against the decision of the Sudder Dewanny Adawlut ; and that the brothers had all along appeared much interested in the concerns of Lal Dhowkul Sing. These facts were considered to afford a strong presumption against the truth of the alleged separation, and of the cause to which it was attributed. Several documents were filed by the defendants, in which the names of the brothers were separately entered. The Second Judge, however, did not consider this circumstance to be incompatible with the existence of a family partnership : and on these considerations he passed a decree in favour of the plaintiffs, directing that the sum claimed by them should be paid by Ram Doss, and by the sons, brothers, and nephew of Ruttee Ram. The costs of suit were made chargeable to the defendants.

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The brothers and nephew of Ruttee Ram appealed from this decision to the Sudder Dewanny Adawlut, on the same pleas as they had urged in the Provincial Court, and added that the heirs of Ruttee Ram were answerable for not more than one half of the sum claimed : that they were merely liable to make good the sums received by Lal Dhowkul Sing during the period for which they were security ; which was limited to five months of 1214, F. S., and nine months of 1215. F. S., and that the sum demandable from them, as sureties for that period, amounted on an average of the collections of those years to 20,000 rupees, of which the respondents acknowledged to have received 16,000 rupees, so that 4,000 rupees only remained to be paid in equal proportions by Ram Doss, and the heirs of Ruttee Ram. They also objected to paying the costs of suit, charged by the respondents, such agreement not having been entered in the bond.

The respondents pleaded that the securities were jointly and severally liable to be called upon to pay the whole of the amount for which they bound themselves : and that though on the death of their father, fresh security was demanded, yet the property left by him was answerable for the obligation which he had incurred, until it should be released from such responsibility, either by the payment of all demands, or by the confirmation of the decree of the Provincial Court ; and that the responsibility of Ruttee Ram and Ram Doss equally continued until these conditions were fulfilled.

The Court (present J. Fendall and S. T. Goad) on consideration of all the circumstances of the case, were of opinion that the facts of Ruttee Ram and Jhyntee Ram having become security for the costs of the appeal preferred to the King in Council by Dhowkul Sing against the decision of the Sudder Dewanny Adawlut, under which possession of the talook of Dya was restored to Lal Rooder Pertaub Sing, of Ram Buksh having become security for the payment of the public revenue assessed on the talook, and of all the members of the family having been in some way concerned in the

1819. **Jhyntee Ram Misser and others, v. Raja Mhyphal Sing and another.** affairs of Lal Dhowkul Sing, afforded strong grounds for supposing the family to be still undivided, and that the appellants had pleaded the separation merely to avoid payment of the debt. It also appeared that the respondents had become security for Lal Dhowkul Sing at the request of the appellants, and on their acknowledging the security bond entered into by Ruttee Ram and Ram Doss to be still in full force. The Court, therefore, seeing no grounds for altering the decision passed by the Provincial Court, confirmed it and dismissed the appeal with costs.

1819. **THAN SING and MAHAJEET SING, Appellants,**
versus
MUSSUMMAUT JEETOO, Respondent.
 Dec. 2nd.

According to the Hindoo law, as current in Agra, a childless widow, after her husband's death, will succeed to the moiety of a village granted to him and his brother by the Raja of the country, on a rent-free tenure; partition being presumed. She has only a life interest therein, and cannot alienate it. After her death it will go to her husband's heirs. THE respondent (originally plaintiff) instituted this action in the Zillah Court of Agra, on the 29th of April 1814, to recover from Ludja Ram, Bishen Doss, Than Sing and Mahajeet, brothers of her deceased husband, a moiety of the village of Nowgaweh, situate in pergunna Sonk (formerly attached to pergunna Sonsa), held rent free under a *sunnud* granted by Madhoo Rao Narain Scindia.

She stated in her plaint, that the village in question was granted on a rent free tenure to her husband, Bintee Ram, and his brother Bishen Doss, by Madhoo Rao Narain Scindia, under a *maafee sunnud*, in the year 1204, F. S., (A. D. 1796-7) in their joint names; and that Bintee Ram had possession thereof till it was attached by the officers of the Mahratta Government in the year 1856, *Sumbut æra* (1206-7, F. S.,) that he died in the following year, and the village remained under attachment till she, having supplied Bishen Doss with money for his expenses, sent him to General Perron, the *aumil* of that part of the country under the Mahratta Government, who removed the attachment in the year 1860 of the *Sumbut æra* (1210-11, F. S.), and delivered the village to them, on the same rent free tenure: that she received a moiety of the profits thereof for the years 1861 and 1862, *Sumbut æra*, (1211-12, and 1212-13, F. S.), that the defendants had unjustly dispossessed her, and refused to pay her the share of the profits, to which she was entitled in right of her deceased husband, she therefore instituted the present action under an attested copy of the *maafee sunnud*, the original having been given in to the Board of Commissioners, laying her suit at 4,250 rupees, or ten times the moiety of the annual produce of the whole village, which she stated to produce the sum of 850 rupees.

Ludja Ram, the elder brother of the plaintiff's husband, did not appear to defend the suit. It appeared from the proceedings, that he had separated from the family during the lifetime of his father, and a letter from him to the plaintiff was filed, wherein he acknowledged that the claim of the plaintiff was just.

Bishen Doss and Than Sing denied the right of the plaintiff to any share in the village. They admitted that the *sunnud* was granted in the joint names of Bintee Ram and Bishen Doss, but stated that the former never had possession thereof, he having executed a deed, whereby he relinquished the village to Than Sing, the *Poojaree*, or officiating priest of the idol Sree Ram Chund Jeo, for the expenses of the worship, &c; that the plaintiff had never received any part of the produce, and that when the village was attacked by General Perron, Bishen Doss, without any pecuniary aid from the plaintiff, got the attachment removed. They stated that the plaintiff had appropriated large sums of money, the joint property of the family, which were in the hands of her husband, and that she was now living in the city of Agra in a disreputable manner: that she had been expelled from her tribe, on account of her profligate conduct, and therefore, under the Hindoo law, was not entitled even to maintenance from the funds of the family: and that she had instituted the present action in anticipation of a prosecution for the recovery of the property which she had unjustly embezzled.

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Jeetoo.

Mahajeet resisted the claim on the same grounds, but denied the legality of the transfer of the village to Than Sing, *Poojaree*, and claimed to share therein as a joint family estate.

The plaintiff, in her rejoinder, denied the imputations cast on her character by the defendants, and the alleged transfer of the village. She pleaded that the village was not ancestral property, and that she therefore was entitled to a moiety thereof in right of her husband, who had acquired it. In refutation of the alleged transfer, which would presume a friendly feeling between the parties, she stated, that Than Sing had attempted the life of her husband by poison, and that he left his residence, being in fear of his life, and that a similar fear had compelled her to take up her abode in the city of Agra. The defendants in their reply alleged that the village was an ancestral estate, inasmuch as it was granted to their father Jograj, though the *sunnud* was drawn in the names of his sons, and denied that the plaintiff had any cause of complaint against them.

The following documents were filed by the plaintiff:

A copy of a *maafec sunnud* (attested by the Collector), under the seal of Radoo Ram Narain, granting the village in question on a rent free tenure to Bintee Ram and Bishen Doss in perpetuity, bearing date 29th *Mohurram* (1212 A. H.), 1204, F. S.

The letter from Ludja Ram above quoted.

A deed executed (on stamp paper) by certain of the zemindars of the village, acknowledging that they had paid, and promising still to pay a moiety of the rents thereof to the plaintiff.

A letter from one Gunsheam, farmer of the village, to her husband, transmitting to him 66 rupees, in part payment of the rent thereof.

A *muhzur-nama* or document signed by various witnesses, declaratory of the plaintiff's right to a moiety of the village, in right of her husband.

The defendant, Than Sing, filed a Hindoe deed purporting to be executed by Bintee Ram, whereby he resigned the village for the

1819. expenses of the idol to Than Sing, the *Poojaree*, or officiating priest. The defendant also filed a *muhzur-nama* signed by witnesses, declaring that the plaintiff had been expelled from her tribe, on account of her profligate conduct, and was consequently debarred from claiming her husband's property.

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On referring to the register of rent free lands in the office of the Collector of the district, it appeared that the village had been granted to Bintee Ram and Bishen Doss, in the year 1204, F. S. by a *sunnud* under the seal of Madhoo Rao Narain Scindia; that Bintee Ram had died previously to the cession to the Honorable Company of the pergunnas of Sonk, Sonsa and Sahar, which event took place in the month of November 1808, since which time, the names of Bishen Doss and Than Sing had been entered in the register as *maafcedars*.

After perusing the pleadings and documents filed by the parties, and hearing the evidence of the witnesses, the Zillah Judge observed, that though the plaintiff had not proved that she ever had actual seizin of the village, she had established the fact of her having received part of the profits thereof, for the years 1861 and 1862 *Sumbut æra*: he rejected the deed of transfer, filed by Than Sing, as irregular in its execution, and not supported by credible evidence. He also rejected the *muhzur-namas*, as deeds of too vague a nature to be received as evidence in a Court of justice, and observed that the witnesses brought by the defendants to prove the profligate conduct of the plaintiff could not speak to any particular acts of impropriety, and that their evidence was too general to establish any thing against her. He considered the point at issue to be the right of the plaintiff to the property of her husband, under the Hindoo law; to ascertain which, he put the following questions to the pundit of his Court:

One of five brothers, after the death of his father, obtains a grant of a village under a *maafce sunnud* in his own name and the name of one of his brothers. He dies, leaving four brothers and a widow. An answer therefore to the following questions is required: 1st. Can all the brothers, or only those whose names are entered in the *sunnud*, claim the village? 2nd, Is the widow entitled to her husband's share, or is her right barred by the fact of her being childless?

The answers of the pundit were in the following terms: 1st, If a person, without aid of property left by his father, acquire real property, this property so acquired belongs solely to him, and not to his brothers. If any other co-operated with him in acquiring it, their shares are equal. 2nd, If the acquirer of real property die childless, even though he were at the time in family partnership with his brothers, his property will go to his widow, and not to his brothers. The widow cannot, however, alienate it by gift or sale: she will enjoy possession thereof during her lifetime, and after her death, it will go to her husband's heirs. The authorities for these answers are *Munoo* and *Yajnyawalkya*.

The defendants denied the correctness of the law, as laid down in these answers, and filed opinions (*vyavusthas*) delivered by certain pundits in the city of Agra, which declared that in cases of family partnership, the brothers of a person acquiring pro-

erty, share equally with the acquirer, and, on his death, the property devolves on them to the exclusion of his childless widow. They prayed therefore that answers to the questions put to the law officer of the Zillah Court might be obtained from the law officer of the Provincial Court. In compliance with their prayer the questions were sent to the Provincial Court, by whom they were submitted to their pundit. His answers were as follow: 1st, If one or two persons acquire property by their own exertions, without aid from the family property, other brothers, though in family partnership, do not participate with them. If the property be acquired with aid from the family funds, the acquirer will take two shares, and the other brothers in equal proportions. If a person, being supported by a stranger, learn an art, and by means of his art acquire property, his brothers will not participate therein. If being supported by his father, or his father's family, he learn his art, he will receive two shares and those of his brothers, who are learned, will share equally. If they be ignorant, they will get nothing, unless with the consent of the acquirer. Authorities from *Vishnu, Yajnyawalkya, Cat'yayuna, Vrihaspati* and *Narda*. 2nd, If a person die and leave no son, grandson, or great grandson (in the male line), his widow, if she remain chaste, and respectfully obey the father, mother, and other chiefs of her husband's family, is entitled to his share of real and personal property. If her husband, during his lifetime, had lived with his brothers in family partnership, or if having once separated from them he again have joined the family, his widow, being childless, has no claim to her husband's property. His brothers will take it, and the widow is entitled to food and raiment during her life. Authorities from the *Mutakshura Dayatutwa*, and *Mayookha*.

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On consideration of the circumstances of the case, and the opinions of the pundits of the Zillah and Provincial Courts, the Zillah Judge was of opinion, that the plaintiff's claim was clear and unobjectionable, and that no circumstances appeared to bar it. He therefore passed a judgment in her favour, on the 30th of September 1814, awarding to her possession of a moiety of the village in question, and making the costs payable by Bishen Doss and Than Sing.

These persons appealed from this decision to the Provincial Court. They pleaded the deed of transfer, and objected to the form in which the question had been put to the pundits, arguing that the pundits should have been required to state whether the law would have awarded the property in dispute to the plaintiff, the deed of transfer being in existence and valid. They also pleaded, that the *muhzur-nama* had been fully proved, and that it should be considered as the award of a *punchayut*. The respondent combated these pleas with the same arguments which had been used by her in the Zillah Court.

The Fourth Judge of the Provincial Court considered the right of the respondent clearly established. He observed, that it was proved that the respondent had received part of the profits of the village, as stated in her plaint; he rejected the deed of transfer as improbable, from the proved enmity which subsisted

1819. between the parties at the time of its alleged execution, and observed that the fact of the names of the appellants being entered in the *lakhiraj* register as *maafeedars*, was accounted for by the established fact of Bintee Ram's having appointed them his *mokhtars*, in the year 1855 *Sumbut* æra (1204, 1205, F. S.), and that as the respondent had not forfeited her claim to her husband's property by her ill conduct, she was entitled, under the *vyuvusthas*, to possession thereof. He therefore passed a decree on the 5th of September 1815, confirming the Zillah decree and dismissing the appeal with costs payable by the appellants.

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mant
Jeetoo.

Than Sing and Mahajet being dissatisfied with this decision presented a petition to the Sudder Dewanny Adawlut accompanied by copies of the decrees passed by the lower Courts, and of the *vyurusthas* of the pundits of those Courts, and of the *vyuvusthas* filed by them in the Zillah Court, praying for the admission of a special appeal, on the grounds of the said decrees, which awarded to the plaintiff possession of a moiety of the village, being inconsistent with the *vyuvustha* of the Provincial Court, which declared her entitled merely to food and raiment. The Court having submitted the *vyuvusthas* of the pundit of the Provincial Court to their law officers, it was declared by them to be correct; the Court therefore admitted the special appeal, on the grounds of this inconsistency. The answers of the respondent were similar to the pleas formerly adduced by her.

Previously to deciding the case, the Court ordered that the *maafee sunnud* should be submitted to their pundits, with instructions to answer the following questions, and state the law thereon, according to the *Mitakshura* as received in the district of Agra.

In this *sunnud*, which is a *maafee sunnud* for a village, the names of Bintee Ram, the husband of the respondent, and Bishen Doss, his own brother, are entered: and it purports to grant the village to them and their heirs in perpetuity. Under the deed, both brothers had possession and Bintee Ram dying, leaves the respondent his widow: under these circumstances, it is asked, whether a moiety of the village is the right of the respondent, during her lifetime, or of Bishen Doss? and if Bishen Doss be entitled thereto, whether the respondent can claim from him food and raiment?

Their answer was in the following terms:

If two brothers, Bramins, to whom the raja of the country has given a village as charity, and in order to perpetuate the gift, has granted a *sunnud*, have, under that *sunnud*, had possession of the village in equal shares, and one of them die childless, leaving a widow, that moiety of the village, of which he had possession, will go to his widow, and not to his brother. For, from the circumstance of the two brothers having had possession each of a moiety of the village, a partition is presumed: and of property, which falls to a husband on a partition, his widow is the first heir. Under the terms of the *sunnud*, the heirs of the donee will take the property. It is not customary to enter the names of females in such documents, men's names only being inserted. If the heirs generally are not meant, then the father and brothers cannot take; this would be contrary to the *shaster*, and the custom of the country. This *vyuvustha* is agreeable to the *Mitakshura* and other law tracts current in Agra.

Authorities: 1st, *Yajnyawalcya*, cited in the *Mitakshura* and 1819.
other tracts. "The property of a person who has no great grandson
(meaning neither son, grandson, nor great grandson in the male
line) will go to his wife; if he have no wife, his daughter, and in
default of a daughter, daughter's sons, &c. will succeed thereto. Than Sing
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jeet Sing, v.
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2nd, *Mitakshura*. "If a person, who has possession of divided
property, and has not again joined his brothers, die, and leave no
son, or grandson, his wife will take his property."

The Court (present J. Fendall and S. T. Goad) on considering
this opinion, and the whole of the proceedings held in the case, saw
no reason for altering the decisions of the Zillah and Provincial
Courts. They therefore passed a final judgment, on the 2nd
of December 1819, in favour of the respondent, awarding to her
possession of a moiety of the village during her life time, and de-
claring that she was not authorized to alienate it, and that on her
death, the heirs of her deceased husband should succeed thereto.
The costs were made payable by the appellants.

KOWLA KAUNT MOKERJEA, Appellant,

versus

RAM MOHUN GOSAIN, HURREE CHURN GOON,
and MANICK RAM GOON, Respondents.

1819.

Dec. 21st.

THIS action was instituted on the 17th of February 1812, in
the Zillah Court of Burdwan; by the appellant (formerly plaintiff)
to obtain possession of an eleven ana share of mouza Pansuth,
situate in pergunna Soomere Shahee, the zemindaree of Ranee
Kumul Koomaree. The right
holders of
putnee
talooks of
the second
or lower
degrees in
the zemiu-
dary of
Burdwan,
is not liable
to be can-
celled by
the resig-
nation of
the putnee-
dar who
granted the
talook. It
can only be
cancelled
by a public
sale for
arrears of
revenue.

The plaintiff stated, that Ranee Kumul Koomaree having sold
pergunna Soomere Shahee, as a *putnee talook*, to Dewan Rugoo-
nath Rai, he sold mouza Pansuth to Radha Nath Bonnerjee, as a
dur-putnee talook: that Rugoonath Rai having fallen in balance, Burdwan,
resigned his tenure into the hands of the zemindar, on which the
village in question was resold as a *putnee talook* to Ram Gopal
Mokerjee, whose name remained in the zemindar's books as *putnee-*
dar for two years, during which time, however, he never had
possession thereof, a *suzawul* having been appointed to collect the
rents from the *ryots*: that on his resignation, the village was
again sold on the same tenure to the plaintiff, and that he considered
himself entitled under his purchase to possession of the whole
village: that the defendants, Ram Mohun Gosain, Hurree Churn
Goon and Manick Ram Goon kept possession of an eleven ana
share thereof, on the plea that they were entitled to hold it, as
dur-putneedars under deeds granted to them by Radha Nath
Bonnerjee. He pleaded, that the resignation of Rugoonath Rai,
the *sudder putneedar*, from whom the right of Radha Nath was

1819. derived, caused the right of the persons who held from him (Radha Nath) to fail: and that as the names of the defendants had not been registered as talookdars in the zemindar's *cutchery*, as directed by the eighth clause of section 15, regulation 7, 1799, they could not maintain a title to the lands claimed by them. He therefore instituted the present action to recover possession of those parts of the village of which they retained possession, the annual produce of which amounted to 337 rupees, 8 anas.

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others.

The defendants stated, that when Radha Nath Bonnerjee held the village as a *dur-putnee talook*, he, in the year 1213, B. S., sold 3 anas thereof to Ram Mohun Gosain (defendant), at a *jumma* of 86 rupees, 4 anas; and eight anas thereof to Gooroo Pershad Koond, to hold of him as a *se-putnee talook* assessed at 230 rupees *per annum*, and retained the remaining five anas in his own hands: that Gooroo Pershad Koond in the same year sold his interest in four anas of his purchase, assessed at an annual *jumma* of 115 rupees, to the defendants Hurree Churn Goon, and Manick Ram Goon, and in the remaining four anas, which was assessed at the same *jumma* to Kishun Doss Gosain, by whom it was made over to the same defendants, who now hold the whole eight ana share as a *se-putnee talook*, assessed at an annual *jumma* of 230 rupees; that it was not customary, or necessary, to have the names of the under lessees registered in the zemindar's *cutchery*, it being sufficient that the name of the *sudder putneedar*, to whom the zemindar looks for the punctual payment of his rents, should be registered therein. They pleaded, that the resignation of the *sudder putneedar* did not affect the right of the lessees under him, and that as long as they continued to pay the rents assessed on their talooks, they could not be dispossessed: that they had paid the full amount of the *jumma* assessed on their talooks to the former *putneedars*, and were willing to pay the same to the plaintiff, but that he refused to receive it.

The Judge of the Zillah Court observed, that under the provisions of the eighth clause of section 15, regulation 7, 1799, all transfers of talooks, or portions of them, must be registered in the *cutchery* of the zemindar, and that if a distribution of the *jumma* should be necessary on a division, the written consent of the zemindar must be obtained; and that as the names of the defendants did not appear in the register of talookdars kept in the zemindar's *cutchery*, their claim to hold the lands in their possession, as a talook, was contrary to the provisions above quoted: that under section 7, regulation 8, 1793, talookdars, who hold their talooks under writings from the zemindar, not expressly transferring the property in the soil, are to be considered merely in the light of leaseholders: that under the concluding part of section 59, of that regulation, farmers are prohibited from granting a lease of lands for a period extending beyond their own leases, unless with the permission of the zemindar, or, if the lands form part of a dependant talook, of the dependant talookdar: that though section 2, regulation 5, 1812, declared that proprietors of land are authorized to grant leases for any period they may consider most convenient to themselves and their tenants, and most conducive to

the improvement of their talooks, yet this rule is explained by section 2, regulation 18, of the same year, not to empower persons holding a restricted interest in estates, whether for life, or other limited period, or subject to control or restriction in the use or disposal of the property, to grant leases extending beyond the term of their own interests in the property, or exceeding their power and authority over it. He was of opinion, that the right of the defendants to hold the lands in their possession as talooks under deeds granted by Radha Nath Bonnerjee had lapsed, as the right of Radha Nath himself had lapsed by the resignation of Rugoonath Rai, the *sudder putneedar*. As therefore the purchase of the village by the plaintiff was acknowledged by the defendants, the Zillah Judge passed a judgment in his favour, on the 26th of March 1813, and ordered that he should be put in possession of the lands claimed by him. The parties were ordered each to pay their own costs of suit

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The defendants being dissatisfied with this decision, appealed therefrom to the Provincial Court of Calcutta. They pleaded, that the creation and existence of talooks of the nature of that claimed by them, was upheld both by the custom of the country, and the decisions of the Civil Courts: that the provisions of the eighth clause of section 15, regulation 7, 1799, had never been considered applicable to the *dur-putnee* talooks of Burdwan: that as the *putnee* talookdar held of the zemindar in perpetuity, the talook granted by him to the *dur-putneedar*, and by the latter to the talookdars under him, being held on precisely the same tenure, could not be considered to be in violation of the provisions of section 2, regulation 18, 1812, that the rights of *dur-putneedars*, *se-putneedars*, &c. were frequently sold in satisfaction of decrees of court, and on the death of the holder were inheritable like other property: that they were not revocable at the will of the grantor, and consequently were not affected by the resignation by him of his tenure into the hands of his immediate superior.

The respondent rested his claims on the pleas urged by him in the Zillah Court.

The Court, previously to entering on the merits of the suit, ordered that further enquiry should be made into the circumstances of the case. From this further enquiry, it appeared, that on the 1st Bysakh 1211, B. S., the zemindar had, according to the custom of the country, sold the whole of pergunna Soomiere Shahee to Rugoonath Rai for the sum of 19,645 rupees, as a *putnee* talook to hold in perpetuity; and that Rugoonath Rai granted to Radha Nath Bonnerjee, mouza Pansuth, one of the villages of the said pergunna, as a *dur-putnee* talook, in consideration of a sum of money paid to him by that person: that Radha Nath sold three anas thereof to Ram Mohun Gosain, and eight anas to Gooroo Pershad Koond, from whom, by the transfers alluded to by Hurree Churn Goon and Manick Ram Goon, it had become vested in them: that Rugoo Nath Rai having resigned the pergunna into the hands of the zemindar, she had sold the village as a *putnee* talook to hold in perpetuity; first, to Ram Gopal Mokerjee, and on his resignation, to the plaintiff, who, under his purchase, claimed a right to the whole of the village. The Court did not consider

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that any of these persons had transferred their right in the village: that they had merely made arrangements for the payment of the rents due by them to their immediate superiors: that the engagements entered into by the parties could not be annulled, but by mutual consent, or by a public sale for arrears of rent, due by the *putneedar* to the zemindar, or by any of the under lessees to his superior, under the spirit of the concluding part of the fifth clause of section 29, regulation 7, 1799, which provides that no private engagements entered into by a defaulting landed proprietor shall be held to bar the right of Government to hold the whole of his lands answerable for the payment of the public revenue assessed thereon, and to sell the same by public auction in satisfaction of any arrears which might accrue, and that the resignation of the *sudder putneedar*, of his *pottah* into the hands of the zemindar, though binding on him, as far as regarded his own reserved rights, to which reserved rights only the plaintiff succeeded, could not be held to affect the arrangements made by him with the *dur-putneedar*, or by the latter with the inferior lessees: that to admit of such proceedings would open a door to great injustice and fraud, as it would put it in the power of a zemindar to sell a *putnee* talook to his Dewan, or other person with whom he had an understanding, and to receive it back from him, after he (the *putneedar*) had sold portions thereof as *dur-putnee* talooks to other persons, for a valuable consideration, to the great detriment of the said purchasers. They observed that section 7, regulation 8, 1793, was merely declaratory of what talookdars, holding talooks at the time of the decennial settlement, were to be considered as leaseholders only, and not entitled to be rendered independant, and that it did not apply to talookdars, whose talooks had been created by the zemindar on a tenure in perpetuity, subsequently to that settlement; and consequently not to the *putnee* talooks of the zemindar of Burdwan: that as the *putneedars* held their talooks of the zemindar in perpetuity, by the payment of a certain rent, and after splitting it into portions, granted the said portions as *dur-putnee* talooks on the same terms they held from the zemindar, these grants are not in violation of the provisions of section 59, regulation 8, 1793, and section 2, regulation 18, 1812, which restrict the grant of leases for a period extending beyond the term of the grantor's interest in the property, or exceeding his power and authority over it. The Court did not think it necessary that the names of the *dur-putneedars*, and the tenants under a *putnee* tenure of an inferior degree, should be registered in the zemindar's *cutchery* in the mode described in the eighth clause of section 15, regulation 7, 1799, as the lands granted by a *putneedar* to a *dur-putneedar* do not thereby become separate, or distinct from the grant of the *putneedar*, who is still answerable to the zemindar for the revenue assessed on his *putnee*, so that the zemindar can sustain no possible injury from the names of the *dur-putneedars* not being registered in his *cutchery*. For these reasons, the Court did not think the plaintiff entitled to recover. They therefore passed a decree, on the 20th of July 1815, reversing the decree of the Zillah Judge, and awarded to the defendants possession of the lands held by them, directing them to pay the

rents to the plaintiff, according to the engagements entered into by them with Radha Nath Bounnerjee. The costs of suit in both Courts were charged to the plaintiff. 1819.

The plaintiff presented a petition to the Court of Sudder Dewanny Adawlut, praying for the admission of a special appeal. As the case appeared to involve a new point, never before decided by the Court, his prayer was complied with, and a special appeal was admitted. Kowla
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The pleas urged by the parties in support of their respective claims were similar to those pleaded in the Zillah and Provincial Courts.

After considering the whole of the pleadings, the reasons on which the decision of the lower Courts were grounded, and the provisions of section 12, regulation 8, 1819, the Court (present J. Fendall and S. T. Goad) saw no reason for altering the decision of the Provincial Court, which appeared to be perfectly correct and proper. They therefore passed a final judgment on the 21st of December 1819, confirming that decision, and dismissing the appeal with costs payable by the appellants (a)

(a) Section 11, regulation 8, 1819, declares that the sale of a *putnee talook* by public auction for arrears of rent due to the zemindar, invalidates the transfer by sale or gift of any portion thereof, and that the auction purchaser shall receive the tenure free from any incumbrances which may have accrued by the act of the defaulter, or his legal representatives. Hence the holders of a *putnee talook* of the second, or any lower degree, lose their right to hold possession of the land and to collect the rents of the *ryots*, this right having been merely enjoyed in consequence of the defaulter's assignment of a certain portion of his own interest, the whole of which was liable for the rent. This rule, however, is explained by section 12, of the same regulation, not to apply to any private transfer by a *putnee talookdar*, of his own interest, nor to a public sale in execution of a decree, nor to a case of relinquishment by the talookdar in favour of the zemindar, or to any act originating with him, other than default as aforesaid: for all such operations involve only a transfer of the tenure in the state in which it may be at the time, and the new incumbent succeeds to no more than the reserved rights of the former tenant, such as they may be, and is of course subject to any restriction put upon the tenure by his act.

AN

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7 The appellants were adjudged by the Provincial Court, to pay a debt borrowed by their brother, on the ground of the family having been undivided, and of the money borrowed having been applied for the benefit of the family generally: but the decree allowed them, at the same time, to sue for the recovery of the sum adjudged from the estate of their brother. A special appeal was admitted against this part of the decree as inconsistent, and so much of the decree as gave this option was annulled by the Court of Sudder Dewanny Adawlut. 247

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The appellant, a Hindoo woman, who had embraced the Moohummudan faith, sued her husband to recover property which devolved on her at the death of her parents. A *punchayat* decided that she (previous to her apostasy) had forfeited all claim to the property in question by her profligate conduct. Their award was upheld and the claim dismissed. 257

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3 A talook being separated from a zemindaree, by the consent of the parties concern-

ed, and assessed by the collector at a rate of *jumma* to which it was subject previously to the separation, without reference to its actual produce; such assessment declared null and void, and another directed to be made, according to clause 5, section 10, regulation 1, 1793, which prescribes, that when a portion of an estate shall be transferred by private sale, gift, or otherwise, the assessment upon the portion so transferred shall be fixed at an amount which shall bear the same proportion to its actual produce, as the assessment upon the whole estate may bear to the whole of the actual produce. 100

4 A rent free (*Barmooter*) tenure, being erroneously included in the assets of an estate sold by auction, on account of arrears of revenue, is recoverable from the public purchaser at the suit of the proprietor; but no deduction of assessment can be granted on such account by the judicial authorities. 143

5 During the time a pergunna belonging to Government was held *khus*, certain lands were made free of assessment by *lakhiraj sunnuds* duly sanctioned: after this, the pergunna was sold by auction as a zemindaree, subject to a specific *jumma*: the purchaser sues Government for a deduction in his *jumma*, on account of the lands included in the previous grants. Claim dismissed, the *jumma* payable by him having been distinctly mentioned in the proclamation advertising the sale. 240

6 The power of altering the public assessment is not vested by the regulations in the Courts of civil judicature, but is reserved exclusively to the Governor General in Council. 242

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1 Property belonging to a public defaulter being attached, and about to be sold in satisfaction of the dues of Government, should no other person claim that property, it is sufficient that previous to the sale, a summary enquiry be made into the merits of the claim. A formal investigation is not, in the first instance, necessary. But it is at the option of the claimant to institute, subsequently, a regular suit, and if his title be proved, the sale will be void and the property adjudged to him with costs. 162

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- 3 The claims of Government to lands included in the decennial settlement, are subjected to the cognizance of the civil courts of judicature; and no individual can be legally dispossessed from such lands, unless a decree of court has been given against him. 156
- 4 An order passed by the revenue authorities, and confirmed by the executive Government under the regulations which were in force before the regulations enacted in 1793, is not liable to be set aside or altered by the Courts since established. 236
- 5 The power of altering the public assessment is not vested by the regulations in the civil courts of judicature, but is reserved exclusively to the Governor General in Council. 242
- 6 The Courts are not authorized to interfere with the revenue officers, or pass orders in a summary manner, in matters relating to the settlement of estates. 278

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- 1 Two parties execute a deed of compromise (*soulahnama*): one of the parties afterwards pleads that fraud and intimidation had been resorted to; such plea, unless clearly substantiated, cannot (neither can ignorance of existing facts) excuse the party engaging. 23
- 2 To give validity to an agreement, possession of the subject of it is not necessary according to the Hindoo law. 30
- 3 For consideration received, A. engages to effect a release of lands mortgaged by him to B. and make over the same to C., or in default of his effecting the release of the lands in question, to make over other lands of equal value; A. fails in effecting the release; C. claims other equivalent lands; or (in a supplementary plaint) to recover the consideration. Principal and interest advanced by C. decreed against A. but no land; the engagement not being sufficiently specific to maintain a claim for land. 48
- 4 A. executes an engagement to B. undertaking to furnish 250 maunds of silk, at stated periods, and in certain quantities, on consideration of receiving advances from time to time: the whole quantity to be delivered on or before a specified day, or on failure thereof, subjecting himself to a penalty of one rupee for every seer of silk remaining undelivered. On A. failing to fulfil the contract, B. sues him to recover the penalty, as well as for the balance of silk remaining due on the advance; the Court of Sudder Dewanny Adawlut held that, according to the spirit of the contract, B. was entitled only to recover the penalty on the nondelivery of silk for which an advance had been made. 89
- 5 A. enters into a written engagement to B. for the sale of his estate, on condition of receiving the whole amount of the purchase money by a specified period, and in that case engages to execute a regular bill of sale. A. receives part of the purchase money, and B. tenders the remainder before the expiration of the specified period. A. however refuses to abide by the terms of his engagement. At the suit of B. the conditional sale was held to be conclusive against A., although the engagement did not contain any express condition, that it should be considered sufficient to constitute an actual sale. 123
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- 8 A security bond executed by one member of a joint undivided Hindoo family held to be binding on the other members of the same family; the alleged separation being deemed to be fraudulent, in order to evade payment of the debt. A case of *Arzaminee* or counter-security. 316

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- A *Hisehnama*, or deed of partition, made by a Hindoo father, in which he allots to his sons portions of his estate, moveable and immoveable, ancestral and acquired, but which disposition was not carried into effect during his lifetime, is not binding on his sons after his death. If by the deed, an unequal distribution be made of ancestral immoveable property, such disposition is illegal and invalid, as is also an unequal distribution of property acquired by the father, and moveable ancestral property, if made under the influence of a motive, which is held in law to deprive a person of the power to make a distribution. 202

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- 1 A *Kabeennama*, or deed of marriage settlement, by a husband to his junior wife, for a moiety of his estate, was held to be of no avail in law; it appearing that he had previously settled his entire estate on his senior wife, and that the deed in question had been executed without her permission duly obtained. 180
- 2 In a suit by a wife against her husband, both of the *Sheea* sect of Moohummudans, for the amount of her dower, it appearing that the sum of 500 rupees was verbally specified in reading the ceremony in the *Sheea* form, but that a deed of settlement was subsequently executed by the husband for 100,001 rupees, adjudged that the sum specified in the deed was the sum legally demandable. 198
- 3 In the marriage of two minors (*Moohummudans*), the legal guardian of the husband

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- 1 By the Portuguese law of inheritance, one moiety of the estate of the husband devolves at his death on his widow, and the other moiety on his next of kin: according to this law, a distribution was directed to be made of the landed estate of a deceased person; but his wife dying, and several claims to her moiety being preferred, it was subsequently discovered that the deceased was a British subject. As he left no heirs (the relations of a mother or of a wife not being heirs to real property according to the English law), decreed that the estate should revert to Government, by whom it was originally granted to the father of the deceased. 227
- 2 Had the case been decided according to the law of Portugal, the decision with regard to the escheat would have been the same. note 230

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- 1 In a suit for a share of an estate, it appearing that the plaintiff had formerly withdrawn a suit instituted by him, for the same property, being induced by a written promise of the defendant to make an amicable surrender of the share sued for; this was considered as a virtual admission of the plaintiff's right. 77
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- 1 A. purchases his own lands, which were set up to auction for arrears of revenue, by employing a dependant to bid for them. This dependant, by authority of A, alienated them to B. by a deed of *Bye bil-wuffa*, or mortgage and conditional sale, which sale became absolute. A. afterwards brings a suit to recover the lands, as his

own, under the auction purchase, alleging the subsequent transfer to be illegal, inasmuch as B. had exacted usurious interest on the mortgage money. But the original purchase by A., on which he rested his claim and title, having been in direct violation of the regulations, and A. having received more for the lands than he gave for them, even admitting a deduction for the alleged usurious interest; the Court did not judge it necessary to investigate the truth of this allegation, and rejected the claim of A. 71

2 Had B's possession been fraudulent, the estate would have been liable to forfeiture to Government. 72

3 The 4th clause of section 29, regulation 7, 1799, prohibits defaulting landholders, whose lands may be sold, by public sale, for the discharge of arrears of revenue, from becoming the purchasers, directly or indirectly, of their own lands so disposed of under penalty of forfeiture to Government. 73

4 A. being indebted to B. grants him a mortgage of his estate (antedating the mortgage deed eight years,) together with a bond conditioned for the payment of the debt by yearly instalments, and a warrant of attorney to confess judgment. A's estate being attached by Government for arrears of revenue, and several instalments due on the bond being unpaid; B. caused judgment to be entered up in the Supreme Court on his bond and warrant of confession, and sued out execution, under which the lands were sold by the sheriff at public auction, and purchased by C., who afterwards sold them by private contract to D. Seven years afterwards, A. having died, his son and heir sues B., C., and D. to recover the lands, on the plea, that the mortgage to B. by A. was fictitious, and granted with the view of screening his property from other creditors, and that B. had executed an engagement to the above effect; promising that should he cause the estate to be sold under the deeds in his possession, he would himself become the purchaser, and cause it to be transferred to the son of A. Determined that the engagement (if proved,) being intended to defeat the rights of third parties, cannot avail A. or his representatives against B., much less against C. and D., who were purchasers for a valuable consideration, without notice. 118

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GIFTS UNDER THE MOOHUMMUDAN LAW.

1 A deed of gift by a person to a minor, received into her family as an adopted son, for property, of which possession had not been delivered at the time of the gift, or

during the lifetime of the donor, who retained possession of it on behalf of the said minor, held to be valid and complete in law, notwithstanding that the father of such minor was alive: but a claim to a portion of a joint undivided estate, under that instrument, rejected, the gift of such property being invalid in Moohummudan law. 180

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1 The gift by a father of the whole ancestral estate to one son, to the prejudice of the rest, or even to a stranger, is a valid act, (although an immoral one) according to the doctrine received in Bengal: but Query? 42

2 By the Hindoo law, as current in Mithila, (Tirhoot) a father cannot give away the whole ancestral property to one son, to the exclusion of his other sons. 74

3 A., a Hindoo widow, executes a testamentary deed of gift in favour of her four daughters, granting them equal shares of her property to be entered on by them after her death. B. and C. two of the daughters dying during the life of A., the daughter of B. sues D. and E., the surviving daughters, for a fourth of the property, in right of her mother. The claim of B. dismissed; the right of B. having lapsed at her death. 290

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INHERITANCE UNDER MOOHUMMUDAN LAW.

1 The Moosulman law presumes a marriage between parties who live together as man and wife; and nothing appears to invalidate that presumption. A son born under such circumstances, inherits equally as a son born in proved wedlock, and is not divested of his right, as one of the heirs to the estate of his paternal uncle, though discarded by the latter. 112

2 The acknowledgment of a brother by the heir entitles to inheritance. 113

3 A female dying leaves a brother and sister: the brother takes two, and the sister one-third of her ancestral property. 184

INHERITANCE UNDER HINDOO LAW.

1 According to the Hindoo law, as current in Mithila (Tirhoot), claimants to inheri-

- tance as far as the seventh, and even the fourteenth in descent in the male line from a common ancestor, are preferable to a cousin by the mother's side of the deceased proprietor. 11
- 2 According to the law as current in Bengal, the son of a maternal uncle of a woman is not legal heir to her peculiar property. 23
- 3 According to the law as current in Bengal, the sons of the maternal uncle of the deceased, take the inheritance in preference to lineal descendants from a common ancestor beyond the third in ascent. 35
- 4 According to the construction received in Mithila, the term sister includes also half-sister. 23
- 5 Impediments to hereditary succession held by the Hindoo law to be twofold: the first temporary and removable; the second permanent. Offences involving final exclusion from tribe are considered to belong to the latter class. 108
- 6 Sons by different mothers inherit equally. A distribution among them is to be made, not with reference to the mothers, but to the number of sons. 116
- 7 In cases of inheritance, *Koolachar*, or family usage, has the prescriptive force of law, but to establish *Koolachar*, it is necessary that the usage have been ancient and invariable. 116
- 8 A Hindoo, having no sons, executes a deed whereby he grants to his senior widow the whole of his acquired property, in the event of no son being born; in the event of a son being born, the property was to go to him. A son was born, but died before his father. The property in question was declared to be vested in the son immediately on his birth, and on his death reverted to his father, as his heir. On the death of the father, his widow had a life interest therein, without power to alienate it.—Had no son been born, the widow would have taken the estate under the deed with power to alienate it. 309
- 9 According to the Hindoo law as current in Agra, a childless widow, after her husband's death, will succeed to the moiety of a village granted to him and to his brother, by the Raja of the country, on a rent free tenure; partition being presumed. She has only a life interest therein, and cannot alienate it. After her death it will go to her husband's heirs. 320
- See ADOPTION and WIDOWS.

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- 1 In a case of *Dye-bil-wuffa*, or mortgage and conditional sale, the condition for the re-sale being virtually a stipulation for interest beyond the legal rate, the transaction held to be in violation of Regulation 15, 1793, and the interest liable to forfeiture. 146
- 2 But the bill of sale and engagement having been publicly registered, the transaction VOL. II.

not held to be an evasion of the above regulation involving forfeiture of the principal. 146

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JETHANSHA.

The appellant sued his younger brother to obtain $7\frac{1}{2}$ per cent on the moiety of the landed property which devolved to him by inheritance from his father: in right of *Jethansha*, or primogeniture. Claim disallowed, on proof that *Jethansha* was not authorized by law or custom.

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JOINT FUNDS.

- 1 A. and B. are brothers. A. purchases an estate in the name of C. his nephew and son of B. It is proved that A. and B. have no property in common, and that the whole of the purchase money was defrayed by A., who having been in possession of the estate for seven years after the purchase, and having enjoyed all the profits thereof, the presumption is, that he purchased it solely on his own account, and not for his nephew. 53
- 2 By the Hindoo law, as current in Mithila (Tribhoot,) a gift of joint property is invalid. 74
- 3 The plaintiff sued his brother and nephew, to recover the moiety of an estate, on the plea that it had been acquired while the family was undivided. That plea being established by evidence, judgment was given for the plaintiff. 77
- 4 According to the Hindoo law, current in Bengal, if property be acquired without aid from joint funds by the exclusive industry of one member of an undivided Hindoo family, others of the same family, although they were at the time living in co-parcenary with him, have no right to participate in his acquisition. 237

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- 1 A *Jujman*, or member of a Hindoo family who employ a certain *prohit*, or officiating priest, is not at liberty to discard such priest, whilst capable of performing sacrificial or other religious duties. 259

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- 1 A. purchases at a public sale by the collector, the *Julkur* of certain *Jheela*. One of them becomes dry, and it is determined that A.'s purchase of the *Julkur* only does not convey any property in the lands.

which belong to the proprietor of the *Sheel*. The purchase of the *Sheel* would have conveyed a right to the land and water. 51

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LAND TENURES.

- 1 Claim by respondent to a zemindary admitted on proof of right; but he not having preferred his claim against the present possessor within three years, being the period for which the first engagement was entered into, he was declared (in conformity with the provisions contained in clause 3, section 33, regulation 37, 1803,) not entitled to regain possession, until the expiration of ten years from the date of the first lease. 37
- 2 A. a zemindar, grants waste lands to B. on a lease without limitation of period, but with a condition of resumption at any time, on payment of all expenses incurred by B. in preparing the land for cultivation. A. claims to resume on performing the above condition. B. pleads section 8, regulation 8, 1793, respecting *Jungle-booree* tenures, as barring the condition, and rendering his tenure irresumable: determined that the condition for the resumption is legal and valid. 49
- 3 *Jeebki*, is a portion of land granted for the maintenance of a family. *Muttan*, is a portion of land granted by a zemindar, as a remuneration for bringing waste lands into cultivation. 55
- 4 At the formation of the triennial settlement of the conquered provinces in 1210, *Fuslee*, A. stood forward as proprietor of an estate, and entering into engagements with Government, held possession for that period. B. the real proprietor then appears, and sues to recover the profits received by A., alleging that A. acted on her behalf in making engagements for the lands, and under agreement to leave B. in possession of her proprietary rights, and profits; but had fraudulently applied them to his own use. Claim dismissed, no written or other specific engagement between the parties being adduced by the plaintiff. 59
- 5 Lands claimed as *Lakhiraj*, under title deeds registered in the *Bazee Zemin Dufter*, but differing from the records of that office, with respect to the lands specified on the back of the title deeds, held to be a valid tenure exempt from assessment so far only, as the title deeds correspond with the records of the *Bazee Zemin Dufter*. 66
- 6 Claim to lands granted in commutation of a yearly pension under *annuds* executed subsequently to the acquisition of the

Dewanny. Claim dismissed by the Provincial Court: it however appearing that the pension, in lieu of which the grant of lands was made, had been granted before the Company's accession to the Dewanny, the claimant was referred by that Court to the collectors, who rejected his claim, under the provisions of section 3, regulation 24, 1793. On appeal to the Sudder Dewanny Adawlut, the decision against the claimant was affirmed. 83

- 7 The landed estate of a refractory zemindar having been confiscated, was conferred on a person in remuneration of public services, and at his death was held by his son, and afterwards by his grand-son, to the exclusion of all other members of the family. On the suit of two sons of the original grantee to participate with their nephew, judgment given against them, the zemindaree being one of those estates not liable to division, recognized by regulation 9, 1793. Provision was made in that regulation for the future abolition of the custom, and it was enacted that after the 1st of June 1794, such estates should descend according to the Hindoo and Moohummudan laws of inheritance. But the provision was not held applicable to the present case, the father of the claimants having died in A. D. 1774. 92
- 8 A talook originally granted as a dependant tenure, afterwards made independent by a *Kharaynama*, but not actually separated before a public sale of the zemindaree, for arrears of revenue, was included in the sale under the provisions of section 14, regulation 1, 1801, but the auction purchaser having subsequently acknowledged the right of the talookdar to hold the talook distinct from the zemindaree, the separation was adjudged, notwithstanding the objections of a second purchaser of the zemindaree by private sale from the first purchaser. 97
- 9 Claim to obtain possession of a fractional part of an undivided estate, on the ground of a private deed of partition and a distinct settlement, with the sharers for the public assessment rejected, as no actual partition of the lands had taken place, in the mode prescribed by the regulations. 103
- 10 The *Mocuddumee* tenure in zillah Bhau-gulpoor, adjudged to be separable, as a proprietary estate, (under sections 4 and 5, regulation 8, 1793), from the *Chowdree*, to which it had been heretofore attached. 114
- 11 *Mocurrere* leases granted by the collector of zillah Behar in 1788, and sanctioned by the Government and the Court of Directors, not held to be annulled by the subsequent promulgation of the general rules for the decennial settlement. 130
- 12 The claims of Government to lands included in the decennial settlement are subject to the cognizance of the courts of

- judicature, and no individual can legally be dispossessed from such lands, unless a decree of Court have been given against him. Costs given against Government in a suit wherein this principle was not observed, and the plaintiffs, who had been irregularly dispossessed, were at the same time allowed the full benefit of the rule of limitations for the cognizance of civil suits. 156
- 13 The tenure by *jageer* is neither alienable nor hereditary, and is considered as a life grant, merely as far as respects the exemption from public assessment. 158
- 14 In a suit for possession of lands on a *mocurreree* or fixed *jumma*, the *potta* was set aside by the Sudder Dewanny Adawlut, as it appeared that it had never been acted upon, and that the lands specified therein had, both previously and subsequently to the date of execution thereof, been leased out by the grantor, both in *Kutkuna* and *Igara* to different persons and at a variable rent. 225
- 15 A claim to certain villages made by A. against B. and the heirs of C., adjudged in favour of A.; it appearing that the lands in question rested on deeds of sale, which were held to be illegal, inasmuch as they were in violation of section 3, regulation 38, 1793, which prohibits Europeans from holding land without the sanction of the Governor General in Council, and were not sufficiently distinct to give a title to the villages in question. 285
- 16 The right of the holders of *putnee talooks* of the second or lower degrees, in the zemindari of Burdwan, is not liable to be cancelled by the resignation of the *putneedar*, who granted the talook. It can only be cancelled by a public sale for arrears of revenue. 325
- ## LEASES.
- 1 In a suit by a zemindar against a talookdar to recover arrears of rent, the latter pleads an engagement contracted by him with the former proprietor; authorizing him to hold his lands as an independent tenant at a fixed rent. Plaintiff purchased the zemindari partly by private contract, and partly at a public sale for discharge of arrears of revenue. Decreed in conformity with the provisions of regulation 44, 1793, that the defendant's engagement, as far as regards the fixed rent of that part of his talook included in the public purchase of the plaintiff is null and void; but, the terms of the engagement to hold good for the period of ten years, as far as regards that part of the talook included in the private purchase. 80
- 2 *Mocurreree* leases granted by the collector of zillah Behar in 1788, and sanctioned by the Government and the Court of Directors not held to be annulled by the subsequent promulgation of the general rules for the decennial settlement. 130
- 3 A *mocurreree pottah*, or lease in perpetuity to an under-renter, granted subsequently to the enactment of regulation 44, 1793, set aside as contrary to the provisions of section 2, of that regulation. 273
- ## LIMITATION.
- 1 Claim by appellants to certain lands disallowed, as barred by the rule of limitations. 1
- 2 A having borrowed money of B., pledges certain lands to him, and goes on a pilgrimage. After 50 years, in which A. is not heard of, his heirs sue to recover the land on payment of the amount borrowed; adjudged on presumption of A.'s death; the claim not being barred by the rule of limitations. 4
- 3 Clause 4, section 3, regulation 11, 1805, provides that no length of time shall be considered to establish a prescriptive right of property, or to bar the cognizance of a suit for the recovery of property, in cases of mortgage or deposit, wherein the occupant of the land or other property may have acquired or held possession thereof as mortgagee or depositary only, without any proprietary right. 4
- 4 Government claiming certain lands included in the decennial settlement, dispossessed the party in possession, who, on the institution of a suit to recover possession, was allowed full benefit of the rule of limitations. 156
- 5 The prohibition against the trial of suits, the cause of action in which may have arisen previous to August 1765, is applicable to the district of Burdwan, Chittagong and Midnapore, ceded in September 1760, in common with other parts of the provinces included in the Dewanny grant of 1765, no distinction being made in the regulations. 156
- 6 Execution of a decree thirteen years after the date thereof disallowed. 280
- ## MANAGER.
- 1 The manager of an estate borrows money for the payment of arrears of revenue due to Government, giving a bond in the name of two proprietors, one of whom (since dead,) had sole possession at the time; determined, that the manager is personally responsible for the amount in the first instance, with right of recovery from heirs of the deceased proprietor of the estate, on whose account the loan was contracted. 64
- 2 A person officiating for a minor in the capacity of *Tehsildar*, and borrowing money in his own name to discharge the public revenue, will be solely responsible, in the first instance, for the re-payment of it; even after his removal from the office and the minor's succession to it; but, on an adjustment of accounts, he is entitled to be re-imbursed by the latter, should the debt appear to have been really incur-

red on his account; and *bond fide* chargeable to him. 154

MARRIAGE.

- 1 The Moosulman law presumes a marriage between two parties, who lived together as man and wife, and nothing appears to invalidate that presumption. 112
- 2 In the marriage of two minors (Moohumudans,) the legal guardian of the husband not having been present at the marriage, and not having given his consent to the dower, and the husband, on coming of age, not having confirmed his acknowledgment of the dower, adjudged that the dower is not demandable from the husband. 233

MESNE PROFITS.

See RELIGIOUS ESTABLISHMENTS, 1. PRACTISE, 2. 9.

MINORS.

See GIFTS UNDER MOOHUMUDAN LAW, 1. MANAGER 2. MARRIAGE, 2.

MOCUDDUMEE TENURES.

See LAND TENURES, 10.

MOCURREREE TENURES.

See LAND TENURES, 14. LEASES, 2, 3.

MOHUNT.

See USAGE, 4.

MORTGAGE.

- 1 A. having borrowed money of B. pledges certain lauds to him, and goes on a pilgrimage. After 50 years, in which A. is not heard of, his heirs sue to recover the land on payment of the amount borrowed; adjudged on presumption of A's death, the claim not being barred by the rule of limitations. 4
- 2 The mortgage and conditional sale of land by an agent set aside, it appearing that he had no special powers from the proprietor for that purpose; the consideration being inadequate, and the execution of the mortgage money ordered to be refunded with interest. 6
- 3 A person having obtained a bill of sale for certain lands, on the payment of 4,401 rupees, executes a written agreement, in which he agrees that he shall not be put in possession of the lands for the period of one year, four months and seventeen days, at the expiration of which period the lauds shall be resold to the seller, on condition of his paying the sum of 5,801 rupees, otherwise, the engagement to be considered null and void, and the property to vest absolutely in the purchaser: such transaction held to be in reality a *bye-bil-wuffa*, or mortgage and conditional sale. But the condition of the re-sale being virtually

a stipulation for interest beyond the legal rate, the transaction held to be in violation of regulation 15, 1793, and the interest liable to forfeiture. But the bill of sale and engagement having been publicly registered, the transaction was not held to be an evasion of the above regulation involving forfeiture of the principal. The purchaser's claim to the land rejected, with a judgment in his favour for 4,401 rupees, the amount of his original advance. 146

- 4 In an action brought for possession of an estate mortgaged under a deed of *bye-bil-wuffa*, or conditional sale, the period of redemption having expired, a decree was obtained in the Zillah Court. Two years after (the estate having been sold by public auction,) an appeal being preferred to the Provincial Court, the Zillah decree, from its not being conformable to the rules of regulation 17, of 1806, was reversed. The *Sudder Dewanny Adawlut*, however, held the sale to have become absolute, considering the omission of the mortgager to prefer an appeal in due time, and stay the intermediate sale of the estate, as a sufficient bar to his right of redemption. 200

- 5 A. a Moohummudan, sues B. for possession of a village under a deed of mortgage and conditional sale, for 2,081 rupees, redeemable in 5 years. It appearing that A. lent B. only 1,300 rupees, and to avoid the imputation of taking interest, consolidated the interest on that sum for five years with the principal, and caused the aggregate sum to be entered in the bond as principal; adjudged that he is not entitled to possession of the village at the expiration of the period of redemption. The Court, however, ordered that he should recover the principal sum actually lent with interest thereon, as there was no attempt to obtain usurious interest beyond the legal rate. 255

MUTTAN.

See LAND TENURES, 3.

PENALTIES.

See ACTIONS, 2. CONTRACTS, 5, 6.

PENSIONS.

See LAND TENURES, 6.

PILGRIMS.

Pilgrims to Gya are at liberty to choose their own *Kurhwa* or conductor, who will enjoy the emoluments arising from the office, notwithstanding any claim of right to officiate in that capacity set up by another person. 164

PRACTISE.

- 1 Judgment in a suit brought on behalf of appellants by one not duly authorized on

- their parts, not to bar appellant's right of action. 14
- 2 In a suit for possession of a talook, judgment for meane profits against a third party, not a party in the suit, over-ruled. 17
- 3 A plaintiff is at liberty to amend his original claim before it has been investigated. 23
- 4 At no stage of an appeal, can it be dismissed on default from the appellant's neglect in proceeding therein, until a notice have been served upon him, as required by section 12, regulation 5, 1793, (section 21, regulation 4, 1803). 40, 41.
- 5 In a suit for possession of lands, the defendant pleaded two previous decrees in his favour, as barring the present action, but as the decisions in those cases did not affect the merits of the present action, his plea was over-ruled. 49
- 6 A suit having been received by one judge of a Provincial Court, it is not competent to another judge to dismiss it, on the grounds of the cause of action not being such as to render it cognizable by that Court; nor is this just ground, in any cause, for dismissing a suit after the merits have been gone into. 125
- 7 In a suit for the possession of lands and for recovery of profits during dispossession, it is not necessary that the annual produce and profits during dispossession should each exceed the sum of 5,000 rupees, to make the suit originally cognizable in the Provincial Court, but only that the aggregate amount of both should exceed that sum. But see note. 125
- 8 Also when a person brings a suit for land or other immoveable property, and also money or other moveable property, the aggregate amount of both descriptions of property is to be considered as the cause of action. 126
- 9 Three respondents claiming a right to succession to certain lands were all permitted to defend the appeal against a fourth party, but were referred to a regular suit for the purpose of establishing their individual right of succession. 126
- 10 In a suit brought by one person against another for the recovery of certain lands, under a deed of gift alleged to have been executed in his favour by the proprietor, it is only necessary to enquire into the title of the claimant: and should it incidentally appear that neither party has a right to the property, still the rightful owner must institute a regular suit in order to recover it. 178
- 11 In a suit brought by A. against B. C. and D. to recover a share of property acquired by trade, while they were in partnership with his father; a judgment was given in favour of A. Subsequently to execution being sued out by A., D. claims exemption from responsibility under the said decree, on the plea that neither he nor his father had ever been in partnership with the father. of A. The plea was held to be inadmissible; no mention having been made, at any former stage of the proceedings, of the circumstance which it recited. 194
- 12 On the admission of a special appeal, by the Sudder Dewanny Adawlut, against a judgment passed by a Provincial Court, for certain lands in favour of A. against B., a claim being set up by C. as a third party, founded on the absence of all original right on either side, the Court did not judge it necessary to enter into this further claim, but contenting itself with deciding between the former parties, left it to the option of C. to proceed by a regular suit. 219
- 13 In a suit between two individuals, judgment in favour of one of the parties held not to bar the claim of Government, not a party in the suit, to the lands affected by that judgment. 227
- 14 The Court of Sudder Dewanny Adawlut decreed to a sharer, possession of her share, under the provisions of section 13, regulation 3, 1793, though she was not an original plaintiff in the suit. 237
- 15 In a suit brought by a Mussulman against a Hindoo, the decision was grounded on the law of the religion of the defendant, as directed by section 3, regulation 8, 1795. 257
- 16 The Provincial Court having nonsuited the appellants for having sued for only part of their claim, the Sudder Dewanny Adawlut allowed a summary appeal from this decision, and directed the Provincial Court to readmit the suit, and allow the appellants to pay the institution fee on the remainder of their claim, and to amend their plaint, in conformity with section 4, regulation 4, 1793. 293
- 17 A Provincial Court having rejected a petition of appeal on the grounds of the period allowed for appealing having elapsed, without enquiring into the pleas explanatory of the delay; the Sudder Dewanny Adawlut, on a summary appeal, ordered that Court to enquire into the truth of the statement of the appellant previous to rejecting the appeal. 298
- 18 The Provincial Court dismissed on default an appeal, because the appellants neglected to file a reply to the respondent's answer. The Sudder Dewanny Adawlut considering the reply unnecessary, under the spirit of section 9, regulation 26, 1814, although the appeal was admitted before the date fixed for the operation of that rule, ordered the Provincial Courts to readmit the appeal and try it on its merits. 303
- 19 Four years after the date of a decree for money the decree holder sued out execution against the grandson of the person against whom the decree was given. As the case involved a point of Hindoo law which

could not be properly determined on a summary suit, the decree holder was referred to a regular suit to prove the liability of the person from whom he claimed the amount adjudged. 308

PREEMPTION.

- 1 If A. a Moohummudan, transfer lands to B. by sale, and C. afterwards come forward and establish his right of *Shoofa* or preemption, he will be entitled to the lands at the price paid for them by B. who will be compelled to refund the profit accrued during the period of his possession to C., receiving himself the purchase money back from A. 85
- 2 By the settlement concluded between Government and a *mocurrereedar*, he becomes *malik* of the proceeds of his *mocurreree*, with the exception of a portion thereof which the late *malik* receives as *malikana*, consequently the right of the late *malik* in such lands is not wholly transferred to the *mocurrereedar*, but he and the late *malik* are to each other in the relation of partners, and the right of *Shoofa* appertains to one partner over the share of the other partner, because such property is undivided, and he is a sharer in the thing itself. 86

PRESUMPTION.

- 1 The fact of a person not having been heard of for 50 years warrants the presumption that he is dead. 4
- 2 The evidence of witnesses to the fact of an adoption being contradictory, and not supported by circumstantial proof, and the person claiming to have been adopted not appearing in a public document to have been designated as the son of his alleged adoptive father, the presumption will be that the claim is unfounded. 21
- 3 On the death of a Hindoo widow in possession of her husband's estate, claim preferred by A. founded on gift and adoption, under a written permission of the husband, resisted by B. on alleged title of previous gift and denial of adoption of A. Claim disallowed: proof of permission to adopt held defective, and the presumption being, that if it ever had been granted, it had been subsequently cancelled. 44
- 4 A. and B. are brothers, A. purchases an estate in the name of C. his nephew, and son of B. It is proved that A. and B. have no property in common, and that the whole of the purchase money was defrayed by A. who had been in possession of the estate for 7 years after the purchase, and had enjoyed all the profits resulting therefrom: the presumption is that he purchased it solely on his own account, and not for his nephew. Decision in favour of A. accordingly. 53
- 5 The Moohummudan law presumes a marriage between parties who live together as

man and wife when n. appears to
invalidate that presumption. 112

PRIMOGENITURE.

See *Jethanska*, 1.

PRIVILEGES.

- A claim by the appellants to the privilege of levying duties on golahs. 4
See *PILGRIMS*, 1.

PROHIT.

See *Jujman*, 1.

PROVINCIAL COURT.

See *CIVIL COURTS. PRACTICE, &c.*

PUNCHAYT.

See *ARBITRATION*, 1.

RECEIPT.

See *ACTIONS*, 3.

REGULATIONS.

- 1 The provisions of section 10, regulation 1, 1793, held to be applicable solely to independent proprietors of estates, holding their lands in full property, subject to public revenue. 19
- 2 Provision is made in regulation 5, 1812, section 8, for estimating the rent of dependent talookdars. 19
- 3 Under regulation 44, 1793, a *pottah* for the sale of a talook at a fixed rent in perpetuity is invalid with respect to the fixed rent, but valid for the sale. 20
- 4 The rules contained in regulation 11, 1793, for abolishing the custom by which particular estates, descended entire to a single heir, have prospective operation only, from the 1st of July 1794, and uphold the validity of successions, which may have actually taken place under the custom alluded to, previously to that date. 92
- 5 A talook originally granted as a dependent tenure, afterwards made independent by a *khariyana*, but not actually separated before a public sale of the zemindaree for arrears of revenue, was included in the sale, under the provisions of section 14, regulation 1, 1801. 97
- 6 According to the spirit of sections 2, and 3, regulation 13, 1808, when a person brings a suit for land or other immoveable property and also for money or other moveable property, the aggregate amount of both descriptions of property is to be considered as forming the cause of action. But see note. 125
- 7 The provisions of section 63, regulation 8, 1793, regarding the penalty for the refusal to grant receipts for rent paid, is not considered applicable to cases in which the payment not being denied, this refusal is occasioned by a dispute concerning the tenure of the lands. 221

8 The Civil Courts are restricted by regulation 5, 1799, from interfering with the succession to the estate of a person deceased without the institution of a regular civil suit, except in the special cases provided for. 307

RELIGIOUS ESTABLISHMENTS, MOOHUMMUDAN.

See WUQF, 1, 2.

RELIGIOUS ESTABLISHMENTS, HINDOO.

1 Respondent being adjudged entitled to half the proceeds of a religious establishment, sues for half the mesne profits derived by appellant during her sole possession. There being no mode of ascertaining the amount of appellant's profits, judgment for the respondent's holding sole possession during a period equal to that for which appellant singly enjoyed the same. 13

2 A bond containing a stipulation that the necessary expenses of an endowment shall be defrayed from the produce of the lands appropriated to its support; but, mortgaging the surplus profits of such lands in satisfaction of a debt specified in the bond, is illegal under the provisions of the Hindoo law. 126

3 Lands duly endowed for religious purposes are not subject to private alienation. 127

See USAGE, 5.

RENT.

See LAND TENURES and LEASES passim.

REVIEW OF JUDGMENT.

See APPEALS, 4, 5.

SALES.

1 Lands lying within the limits of a certain village, do not necessarily appertain to the public purchaser of that village, provided it shall appear that those lands have been assessed as part of another estate. 8

2 Claim for possession of a talook at a fixed rent, under deed of sale from a zemindar, whose estate had been sold under the authority of the Supreme Court, and purchased by appellants; respondent's title to possession and to mesne profits during the period of dispossession upheld, the rent to be adjusted under the rules of section 8, regulation 5, 1812. 19

3 In a suit by a zemindar against a talookdar to recover arrears of rent, the latter pleads an engagement contracted by him with the former proprietor; authorizing him to hold his lands as an independent tenure at a fixed rent. Plaintiff purchased the talook, partly by private contract, and partly at a public sale for discharge of arrears of revenue. Decreed in conformity with the provisions of regulation 45, 1793, that defendant's engagement as far as regards

the fixed rent of that part of his talook included in the public purchase of the plaintiff, is null and void: but, the terms of the engagement to hold good for the period of ten years, as far regards that part of the talook included in the private purchase. 80

4 A talook originally granted as a dependent tenure, afterwards made independent by a *kharijnama*, but not actually separated before a public sale of the zemindaree for arrears of revenue was included in the sale under the provisions of section 14, regulation 1, 1801. But the auction purchaser having subsequently acknowledged the right of the talookdar to hold the talook distinct from the zemindaree, the separation was adjudged, notwithstanding the objections of a second purchaser of the zemindaree by private sale, from the first purchaser. 97

5 A. enters into a written engagement to B. for the sale of his estate, on condition of receiving the whole amount of the purchase money by a specified period, and in that case, engages to execute a regular bill of sale. A. receives part of the purchase money, and B. tenders the remainder before the expiration of the specified period. A. however refuses to abide by the terms of his engagement. At the suit of B. the conditional sale was held to be conclusive against A. although the engagement did not contain any express condition that it should be considered sufficient to constitute an actual sale. 123

6 A *Burmooter* tenure, free of assessment, being erroneously included in the assets of an estate sold by auction, on account of arrears of public revenue, is recoverable from the public purchaser at the suit of the proprietor. 143

7 No deduction of assessment can be granted on such account by the judicial authorities; but an option of relinquishing his bargain will be given to the purchaser. 143

8 The purchaser availing himself of the option to retain his purchase at the assessment fixed on the estate, at the time of the public sale, is not entitled to any retrospective indemnification for the revenue paid by him, on account of the rent free tenure erroneously included in his purchase; but a proportion of the purchase money, computed to be the amount paid for the tenure, adjudged to the plaintiff in this cause, was ordered to be restored to the purchaser by the original zemindar. 143

9 Property supposed to belong to a public defaulter, being attached and about to be sold, in satisfaction of dues of Government, should another person claim that property, it is sufficient that, previously to the sale, a summary enquiry be made into the merits of the claim. A formal investigation is

not in the first instance necessary. But it is at the option of the claimant to institute, subsequently, a regular suit; and if his title be proved, the sale will be void, and the property adjudged to him with costs. 162

10 The same rule holds good with regard to property under attachment, about to be sold in execution of a decree. 162

11 A claim to recover a *Birt* tenure, on the plea that, as there was no specification thereof in the bill of sale, it was not included in the assets of the estate sold by order of the Supreme Court, dismissed by the Sudder Dewanny Adawlut, on the grounds of the bill of sale plainly stating, that all the lands, both *Khiraj* and *Lahur*, included in the said estate, together with all the right, title and interest of the proprietor therein, were thereby conveyed to the purchasers. 197

12 The Civil Courts have no authority to annul, by a summary order, a public sale of lands made by a Collector. 284

13 A Collector declared not authorized to annul a public sale of lands which he considered to have been purchased under a fictitious name, contrary to regulation; the power of confiscating in such cases being reserved exclusively to the Governor General in Council. 294

SECTS.

See DOWER.

SECURITY.

In an action brought to recover from the sureties of a Stamp *Mohurrir*, a sum of money alleged to have been embezzled by him, from the proceeds of the sale of stamp paper; the plea urged by one of the defendants of fresh sureties having been obtained, subsequent to his undertaking, on account of his security being considered insufficient, does not entitle him to exemption from his original obligation, the security bond never having been cancelled. 195

SEPARATION.

See ASSESSMENT, 3. LAND TENURES, 8. 9.

SETTLEMENT.

See ASSESSMENT AND TENURES.

SHARES.

See INHERITANCE UNDER THE MOOHUMUDAN AND HINDOO LAW.

SHERIFF OF CALCUTTA.

See SALES.

SPECIAL APPEALS.

See APPEALS AND PRACTICE.

SUMMARY APPEALS.

See APPEALS.

SUMMARY SUITS.

1 In a summary suit, under regulation 49, 1793, a decree having been passed against the appellant in the Zillah Court, he petitioned the Provincial Court to admit an appeal from that decision, on the ground that the regulation above mentioned was not relevant to the case. The Provincial Court rejected the petition: but the Court of Sudder Dewanny Adawlut held that an appeal should be admitted for the purpose of investigating the question of the relevancy or irrelevancy of regulation 49, 1793, to the present suit. 39

2 Property supposed to belong to a public defaulter being attached and about to be sold in satisfaction of dues of Government, should another person claim that property, it is sufficient that previously to the sale a summary enquiry be made into the merits of the claim. A formal investigation is not, in the first instance, necessary. But it is at the option of the claimant to institute subsequently a regular suit, and if his title be proved, the sale will be void, and the property adjudged to him with costs. 162

See CIVIL COURTS, 6.

SUPREME COURT.

See CIVIL COURTS, 2.

TALOOKS.

See LAND TENURES.

THIRD PARTY IN A SUIT.

See PRACTICE, 11, 12, 14, 15, 16.

USAGE.

1 A person settling in a foreign district, shall not be deprived of the benefit of the laws of his native district, provided he adheres to its customs and usages. 11

2 In cases of inheritance, *koolachar*, or family usage, has the prescriptive force of law; but, to establish *koolachar*, it is necessary that the usage have been ancient and invariable. 116

3 By the special usage of the principal zemindaree in the district of Tipperah, the person appointed *Jobraj* takes the inheritance in preference to the next of kin; the person appointed *Bura Thakoor* is considered next to him in succession, and takes the inheritance in his default; as well as at his death, provided the *Jobraj*, after becoming Rajah, has not nominated any other person to be his *Jobraj*. 139

4 The office of *Mohunt*, or superintendent of a Hindoo religious establishment, having been by usage elective, such usage must be adhered to, in preference to any other mode of succession; nor can any relinquishment, or devise, by the incumbent, in favour of another person, operate further than as a nomination, which to

- avail, must be confirmed by the usual mode of election. 151
- 5 Claim by appellant to an estate on the plea of family usage, whereby a brother succeeds a brother to the prejudice of surviving sons, disallowed on proof that such was not the family usage. 249
- See Jethunsha, 2.*

WASFE LANDS. *See LAND TENURES, 2.*

WUQF.

- 1 To constitute a *Wuqf*, or pious appropriation of property, it is not required by the Moosulman law, that the grant should be express in the use of that term: provided the nature of the tenure be inferrible from the general contents of the grant. 110
- 2 *Wuqf* lands are not capable of alienation. 110

WIDOWS (HINDOO).

- 1 A Hindoo widow cannot, except under special circumstances, alienate more than a moiety of her deceased husband's moveable property. 23
- 2 She cannot under any circumstances alienate the whole of his immoveable property, nor can she alienate any part without the express consent of the heirs, except under special circumstances. 24
- 3 The consent of *all* her husband's heirs is

- required to the gift by a widow of part of her husband's landed property; and the deed of gift executed by her in favour of a stranger, to be valid, must be attested by *all* her husband's heirs, as consenting parties. 32
- 4 A Hindoo widow may alienate the immoveable property which devolved on her from her husband, without the consent of her husband's heirs, for the performance of his funeral obsequies, and her own maintenance. 167
- 5 A childless Hindoo widow is not entitled to succeed to the estate of her husband, which devolved entire on him from his ancestors, to the exclusion of his brothers. 169
- 6 To entitle a widow to succeed to her husband's estate she must remain chaste. 170
- 7 Hence incontinence, or other act involving expulsion from her tribe, excludes her from inheritance. 167
- 8 By the Hindoo law current in Bengal, a widow is entitled to take her husband's share of ancestral property, which at his death, was held by him and other sharers, as a joint undivided estate; but she has a life interest only. 237
- 9 By the law as received in Benares, the widow is entitled only to her maintenance. 255
- 10 By the law as received in Mithila, also she is only entitled to maintenance. 245
- See ADOPTION, 3, 4, 5.*

